

No. 87-107-CFX
Status: GRANTED

Title: Brenda Patterson, Petitioner
v.
McLean Credit Union

Docketed:
July 17, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Ralston, Charles Stephen

Counsel for respondent: Davis Jr., H. Lee

NOTE* Ext. of time 6/5/87 granted to & incl. 7/17/87
by CJ, Cited

| Entry | Date | Note | Proceedings and Orders |
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| 1 | Jun 3 1987 | | Application for extension of time to file petition and order granting same until July 17, 1987 (Chief Justice, June 5, 1987). |
| 2 | Jul 17 1987 | G | Petition for writ of certiorari filed. |
| 3 | Aug 14 1987 | | Brief of respondent McLean Credit Union in opposition filed. |
| 4 | Aug 19 1987 | | DISTRIBUTED. September 28, 1987 |
| 5 | Sep 5 1987 | X | Reply brief of petitioner Brenda Patterson filed. |
| 6 | Oct 5 1987 | | Petition GRANTED. ***** |
| 7 | Nov 16 1987 | | Joint appendix filed. |
| 9 | Nov 17 1987 | | Order extending time to file brief of petitioner on the merits until December 3, 1987. |
| 10 | Dec 3 1987 | | Brief amicus curiae of United States filed. |
| 11 | Dec 3 1987 | | Brief of petitioner Brenda Patterson filed. |
| 12 | Dec 3 1987 | | Brief amici curiae of ACLU, et al. filed. |
| 13 | Dec 21 1987 | | Record filed. |
| | | * | Certified copy of original record and C.A. proceedings, 8 volumes, received. |
| 15 | Dec 29 1987 | | Order extending time to file brief of respondent on the merits until January 16, 1988. |
| 16 | Jan 5 1988 | | SET FOR ARGUMENT. Monday, February 29, 1988. (2nd Case). (1 hour). |
| 17 | Jan 12 1988 | | Brief of respondent McLean Credit Union filed. |
| 18 | Jan 14 1988 | | CIRCULATED. |
| 19 | Jan 15 1988 | X | Brief amicus curiae of Equal Employment Advisory Council filed. |
| 20 | Feb 11 1988 | X | Reply brief of petitioner Brenda Patterson filed. |
| 21 | Feb 29 1988 | | ARGUED. |

87-107

No. 87-_____

Supreme Court, U.S.
FILED

JUL 17 1987

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 encompass a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race?

2. Did the district court err in instructing the jury that in order for petitioner to prevail on her claim of discrimination in promotion that she must prove that she was more qualified than the white who received the promotion?

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
vs.
MCLEAN CREDIT UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Brenda Patterson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 25, 1986.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 805 F.2d 1143 and is set

out in the appendix to this petition at pages 1a-20a. The order of the court of appeals denying rehearing is set out in the appendix hereto at pages 21a-22a. The oral ruling of the district court granting in part respondent's motion to dismiss is unreported and is set out in the appendix at pages 23a-25a. The judgment of the district court dismissing the case based on the jury's verdict is set out in the appendix at pages 26a-28a.

JURISDICTION

The judgment of the court of appeals affirming the Court's dismissal of the case was entered on November 26, 1986. App. 1a. The court of appeals entered an order denying a timely petition for rehearing en banc on March 19, 1987. App. 22a. On June 5, 1987, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including July 17,

1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

STATEMENT OF THE CASE

1. Proceedings Below

The petitioner, Brenda Patterson, brought this action on January 25, 1984, in the United States District Court for the Middle District of North Carolina against her former employer, McLean Credit Union. The action was brought

under 42 U.S.C. § 1981 and alleged that petitioner was discriminated against with respect to promotions, layoffs, and in the terms and conditions of employment, including racial harassment. In addition, the state tort claim of intentional infliction of mental and emotional distress was brought pursuant to pendent jurisdiction.

The case was tried before a jury from November 12 to November 18, 1985. The trial court dismissed the claim of racial harassment on the ground that 42 U.S.C. § 1981 did not provide a remedy for racial harassment during the term of employment.¹ App. 23a-25a. With regard to petitioner's claim that she was discriminatorily denied promotional opportunities, the district court

¹The district court also did not submit the state tort claim to the jury. The correctness of that ruling is not raised in this petition.

instructed the jury, over the objection of the petitioner, that she had to prove that she was more qualified for the position than the person who received the job.² The jury returned a verdict in favor of the defendant employer and the district court dismissed the case in its entirety. App. 26a-28a.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court. The court of appeals held that Section 1981 covered only racial

²Transcript of Trial, Nov. 18, 1985:

THE COURT: . . . the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received [the promotion], and I have so instructed the jury.

MR. KENNEDY: I would like, for the purposes of the record, to make an exception to that point.

THE COURT: Yes, sir.

Id. at 5-30 - 5-31.

discrimination in hiring, firing and promotion since those matters went to the "very existence and nature of the employment contract." App. 8a. The court ruled that racial harassment related to the terms and conditions of employment and, therefore, did not, standing alone, abridge the right to make and enforce contracts that was conferred by Section 1981. App. 9a.

With regard to the charge to the jury, the court relied on prior Fourth Circuit precedents requiring that a plaintiff must prove that she was more qualified than the person to whom the promotion was given in order for her to establish a *prima facie* case of discrimination. Therefore, the instruction was correct. App. 19a-20a.

A timely petition for rehearing and suggestion for rehearing en banc was denied. App. 21a-22a.

2. Statement of Facts

At trial, petitioner introduced substantial evidence to support her claim that she had been a victim of racial harassment and had been treated differently from similarly situated whites in the terms and conditions of employment. At the very beginning of her employment she was told by the defendant's president, Robert Stevenson, that she would be working only with white women and that those women would probably not like her because they were not used to working with blacks. Plaintiff was never promoted; instead, after her immediate supervisor spoke to the president about petitioner's having too heavy a work load, she was given more work by Stevenson.³ Throughout her employment she was given more work than her white co-workers, and was then

³Tr. of Trial, pp. 1-86 - 1-87.

criticised for her alleged "slowness". When she spoke to the president about her work, she testified that he replied, "Well, blacks are known to work slower than whites by nature." He then added on even more work.⁴ At staff meetings Mr. Stevenson singled out plaintiff and the other black worker by name and criticised them for errors; white workers were not subjected to this treatment.⁵ Finally, Mr. Stevenson would stop by her desk and stare at her four or five times a week, making her nervous and unable to concentrate on her work. Again, white workers were not subjected to this

⁴Id. at 1-88. A white former employee of defendant testified that Mr. Stevenson had berated him for recommending a black man for a computer position. Mr. Stevenson told him that he would not hire a Black because: "We don't need any more problems around here." Transcript of Trial, at p. 2-162.

⁵Id. at 1-89 - 1-90.

treatment.⁶

Plaintiff never was able to find out about promotions that were available.⁷ White workers were trained for higher level positions, while she was not.⁸ A number of white employees were promoted over her who had less education and seniority, but who were given training.⁹ On July 19, 1982, plaintiff was laid off and subsequently terminated; white employees with less experience than her were not.

After the presentation of plaintiff's evidence, the court dismissed the claims of racial harassment and intentional infliction of mental and emotional distress. At the end of the submission of all the evidence the trial

⁶Id. at 1-90 - 1-91.

⁷Id. at 1-91 - 1-92.

⁸Id. at 1-93.

⁹Id. at 1-93 - 1-97.

court instructed the jury that for plaintiff to prevail on the promotion claim she had to prove that she was more qualified for the position of accountant intermediate than was the white person who was promoted.¹⁰ Plaintiff objected

¹⁰The district court charged, in addition to instructing that plaintiff had to have shown an interest in being promoted and that a white person, Susan Howard Williamson, was promoted instead, that:

In order to carry her burden [that defendant denied her a promotion because of her race], the plaintiff must establish . . . (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race. (emphasis added).

With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race.

Transcript of Trial, p. 5-12 -5-13.

The court later instructed that:

[I]t is necessary that [plaintiff]

to this part of the charge.¹¹ The jury returned a verdict for the defendant company.

REASONS FOR GRANTING THE WRIT

This case presents an important issue relating to the enforcement of the civil rights statutes concerning which the circuits are in conflict. The availability of 42 U.S.C. § 1981 as a remedy for harassment that is motivated by racial animus is particularly important because it is only under that section that damages for such harassment may be obtained. Title VII provides

satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion.

Id. at 5-13 - 5-14.

¹¹See n. 2, *supra*.

monetary relief only in the form of back pay when, s.g., a promotion has been denied. Thus, in many cases of harassment the only relief available under Title VII will be an injunction that simply reiterates the command of the statute. Often, that relief will not be a sufficient deterrent to harassment.

As the discussion that follows demonstrates, the problem of racial harassment and other discrimination in the terms and conditions of employment is persistent and recurring. Only the threat of actual and punitive damages under 42 U.S.C. § 1981 can provide an effective deterrent and help to rid the work place of this most pernicious form of discrimination.¹²

¹²See, e.g., Block v. R. H. Macy & Co., Inc., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) (Title VII and § 1981 claims for discharge and racial harassment; \$20,000 in actual and \$60,000 in punitive damages awarded of which only \$7,598 was back pay under Title VII).

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER 42 U.S.C. § 1981 ENCOMPASSES CLAIMS OF RACIAL HARASSMENT.

The court of appeals here held that Section 1981 does not encompass racial harassment on the reasoning that the statute does not cover discrimination in compensation, terms, conditions, or privileges of employment. Rather it held that § 1981 covers only matters that go to the very existence and nature of the employment contract, such as hiring, firing and promotion. Four other courts of appeals have ruled to the contrary and have held that discrimination in the terms and conditions of employment, including racial harassment, violates Section 1981.

The Fifth Circuit has ruled that an offensive work environment caused by racial harassment "would . . . establish a successful case under 42 U.S.C. §§ 1981

and 1983." Hamilton v. Rodgers, 791 F.2d 439, 442 (1986). Similarly, the District of Columbia Circuit has concluded that Section 1981 encompasses a claim that a black plaintiff suffered "conduct and conditions that were worse than those imposed upon white employees." Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984). The court explicitly held that a pattern of differences in the condition of employment, including the telling of a racially derogatory joke, can give rise to liability under Section 1981. Ibid. Therefore, it upheld compensatory damages for humiliation and other emotional harm resulting from "the atmosphere of harassment." Id. at 1236, 1238-39.

Both the Seventh and Eighth Circuits have also permitted recovery under Section 1981 for emotional distress caused by racial harassment in employment

where a defendant subjected a black employee to different terms and conditions of employment because of race. These cases involved discriminatory job assignments, discipline, and other forms of racial harassment. Ranney v. American Air Filter Company, 772 F.2d 1303 (7th Cir. 1985); Block v. R. H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983).¹³ See also Wilmington v. J. I. Case Company, 793 F.2d 909 (8th Cir. 1986).¹⁴ And see,

¹³Although Block involved claims under both Title VII and § 1981, racial harassment was treated as an independent cause of action under § 1981. The court upheld the jury's damage award for "mental anguish, humiliation, embarrassment and stress," caused by such harassment. 712 F.2d at 1245. Damages for emotional distress are not recoverable under Title VII.

¹⁴The court in Wilmington specifically upheld an award of damages for "emotional distress resulting from the conditions under which [plaintiff] worked." 793 F.2d at 922. Although the Court did not use the label "racial harassment," the type of discrimination at issue was the same as that involved in the instant case. The plaintiff in Wilmington was assigned to undesirable

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Goodman v. Lukens Steel Co., 777 F.2d 113 (3rd Cir. 1985), aff'd ____ U.S. ____, 55 U.S.L. Week 4881 (1987) (affirming finding of liability under § 1981 and Title VII based in part on harassment of black employees).

jobs so that he would not earn incentive pay, 793 F.2d at 915; plaintiff in the instant case was given the undesirable job of sweeping and dusting not required of white clerical workers and was assigned an exorbitant amount of work in an attempt to force her to resign. Plaintiff in Wilmington was repeatedly verbally reprimanded, id.; plaintiff in this case was criticized in staff meetings and subjected to racially derogatory remarks. The defendant in Wilmington moved the plaintiff's work station closer to the foreman's office to keep a close watch on him, id.; in this case, defendant's president stared at plaintiff for several minutes several times a week.

II.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT, INCLUDING GOODMAN V. LUKENS STEEL CO. AND SHAARE TEFILA CONGREGATION V. COBB _____

Since the decision of the court below this Court has indicated that liability under both §§ 1981 and 1982, parallel provisions of the Civil Rights Act of 1866, can be based on harassment based on race. In Goodman v. Lukens Steel Co., ____ U.S. ____, 55 U.S.L. Week 4881 (1987) the Court affirmed findings that § 1981 had been violated by, inter alia, toleration by both an employer and a union of racial harassment of black employees. 55 U.S.L. Week at 4883. In Shaare Tefila Congregation v. Cobb, 481 U.S. ____, 93 L.Ed.2d 594 (1987), the Court reversed the Fourth Circuit and held that claims by Jews that they had been subject to harassment and vandalism because of their ancestry stated a cause

of action under § 1982. Plaintiff urges that these decisions directly support their contention that discrimination in the terms and conditions of employment is prohibited by § 1981.

The conclusion that § 1981 prohibits racial harassment in employment is consistent with the language and purpose of the statute. Section 1981 guarantees to blacks "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," (emphasis added). A contract is a combination of many "terms and conditions." For example, a contract to sell goods generally specifies the nature and quantity of the goods, the price, the method of payment, the method of delivery and possibly other "terms and conditions." A contract for employment either explicitly or implicitly covers at least the nature of the job, the salary, the working hours, work rules, and

penalties for violations thereof, and the location of the job. As this Court noted in Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984):

Because the underlying employment relationship is contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract.

Despite these considerations, the court below concluded that the only element of the right to contract protected by § 1981 is the right to obtain employment under an unequal set of conditions. Under the reasoning of the court below, an employer that offered to employ black individuals at a lower salary than white individuals would not violate § 1981, since black individuals would not be totally deprived of the right to contract for a job. This analysis ignores § 1981's protection of an equal right to contract.

The lower court's opinion does not

distinguish, and there is no basis for a distinction, between explicit and implicit conditions of a contract. Under the court's decision, an employer could say to black applicants: "I will hire you if you agree that I may constantly abuse you, give you the worse job assignments and subject you to racially derogatory remarks." Such a condition, were it known at the outset of the contractual relationship, would surely discourage black individuals from entering into an employment contract and thus deprive them of an equal right to make such contracts. The fact that these terms and conditions of employment are not stated at the outset and are not put into a written document does not lead to a different result. The employer's actions establish that these are implicit conditions of the contract which are different for black employees than for

white employees, thus depriving black employees of an equal right to make an acceptable employment contract.

Section 1981's prohibition of discrimination in all of the terms and conditions of the employment contract was made clear by this Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The Court in Johnson found that one of the purposes of § 1981 is to "affor[d] a federal remedy against discrimination in private employment on the basis of race." Id. at 459-60. The Court did not distinguish between hiring, firing and promotion and other terms and conditions of the employment relationship. In fact, the plaintiff's claim in Johnson v. Railway Express Agency, was not about hiring, firing or promotion, but rather discrimination in other terms and conditions of his employment -- seniority rules and job

assignments. *Id.* at 455.

The legislative history of § 1981 also supports coverage of terms and conditions of the employment contract, including work environment and racial harassment. Section 1981 was first enacted as part of § 1 of the Civil Rights Act of 1866. The legislative history and purpose of § 1 was analyzed in detail by this Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).¹⁵ The Court in *Jones v. Mayer* repeatedly emphasized that the 1866 Act was "cast in sweeping terms" in order "to prohibit all racially motivated deprivations of the rights enumerated in

¹⁵The provision of the 1866 Act at issue in *Jones v. Alfred H. Mayer Co.* has been codified as 42 U.S.C. § 1982. In language parallel to that of § 1981, § 1982 guarantees "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." *See* 392 U.S. at 441, n. 78.

the statute." *Id.* at 422, 426.¹⁶ This Court relied on legislative history that Congress "believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act." *Id.* at 435 (emphasis added). *See also id.* at 436.

In addressing the meaning of § 1982, the parallel provision to § 1981 that guarantees equal rights to sell and lease property, the Court held that the 1866 Act conferred "'the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever" *Id.* at 435 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess. at 1781 (Senator Cowan)). Thus, the Court ruled that § 1982 prohibited all racial

¹⁶*See also* 392 U.S. at 431 ("sweeping and efficient"); *id.* at 433 ("sweeping . . . effect").

discrimination in the sale and rental of property. *Id.* at 436-437.

The Court also stressed that the 1866 Act was intended to give "real content" and "practical" meaning to the guarantees of the Thirteenth Amendment. *Id.* at 427, 431 (quoting Cong. Globe, 39th Cong., 1st Sess. 474 (Senator Trumbull))¹⁷ Thus, the Act was intended to eliminate the "'private outrage and atrocity'" that were "'daily inflicted on freedmen.'" *Id.* at 427.

The panel decision's restrictive construction of § 1981 is inconsistent with this legislative history. Congress' desire to prohibit "all racial discrimination affecting" the ability to make and enforce contracts clearly encompasses racial harassment which interferes with enjoyment of the benefits of the contract. Congress' desire to

¹⁷See also 392 U.S. at 434.

provide "practical" freedom of contract and to prevent oppression of black citizens would be rendered meaningless if an employer could, through harassment, deprive black employees of a work experience equal to that of white employees.

In light of these considerations it would be appropriate to vacate the decision of the Fourth Circuit and to remand for further consideration in light of this Court's recent decisions in Goodman v. Lukens Steel Co. and Shaare Tefila Congregation v. Cobb.

III.

THE DECISION BELOW RELATING TO BURDEN OF PROOF CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Conflicts With Texas Dept. of Corrections v. Burdine.

As described above, the district court, over plaintiff's objection, instructed the jury that in order for the

plaintiff to prevail on her discrimination in promotion claim she must prove that she was better qualified for the position than was the white employee who received it. Indeed, the district court further instructed the jury that plaintiff must prove both that she was more qualified and that the employer's intentional discrimination against her because of her race was "the real reason" that she was not promoted.

These instructions, and the line of cases in the Fourth Circuit upon which they were based,¹⁸ are in conflict with the holdings of this Court and with other circuits. The Fourth Circuit's rule squarely conflicts with this Court's decision in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259

¹⁸Young v. Lehman 748 F.2d 194 (4th Cir. 1984); Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

(1981). There, it was held that an "employer has discretion to choose among equally qualified candidates provided that the decision is not based upon unlawful criteria." (Emphasis added.) Admittedly, the mere fact that an employer has chosen a white when there were two equally qualified candidates does not by itself establish discrimination. However, Burdine makes it clear that discrimination can be established absent proof that the Black was better qualified.

To give an example, assume that the selecting official testified that the white and black candidates were equally qualified and therefore he picked the white person because he thought a white would fit in better with an all-white work force. Such testimony would establish beyond question a violation of § 1981. Nevertheless, under the district

court's instruction, the jury here would have been required to find for the employer.

The import of the instruction is to focus the jurors' inquiry entirely on the question of relative qualifications to the exclusion of other evidence from which a finding of discrimination could be inferred. Petitioner introduced substantial evidence that she had been subjected to racially derogatory remarks, had been discriminatorily denied training, and had been harassed because of her race. This evidence would amply support an inference that petitioner had been discriminated against and was denied the promotion irrespective of her qualifications or those of her white co-worker. However, once the jurors had decided that petitioner had not demonstrated superior qualifications, the court's instructions would necessarily

lead them to ignore the other evidence that petitioner had been subjected to disparate treatment.

B. The Decision Below Is In Conflict With Decisions Of Other Circuits.

In explaining the instruction given to the jury the district court stated: "The law in the Fourth Circuit seems to be that in order to make out a prima facie case you must show that you are better qualified than the person who received the promotion."¹⁹ The court of appeals upheld this instruction on the ground that where the reason given in rebuttal to justify an action by the employer was the relative qualifications of the blacks and white applicants, then the plaintiff has the burden of proving that her qualifications are superior.

Both holdings are in conflict with decisions of other circuits. First,

¹⁹See n. 2, SUPRA.

there is substantial agreement among the other courts of appeals that a plaintiff need only establish that she was qualified for the position in order to make out a prima facie case, and not that she had superior qualifications. In Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985), the court vacated the dismissal of the plaintiff's case when a district court required that the plaintiff demonstrate that she was at least as qualified as the person chosen. The Seventh, Eighth, and Ninth Circuits have similarly held that an employee need only show that he or she was qualified for the position at issue in order to establish a prima facie case. See, Christensen v. Equitable Life Assurance Soc., 767 F.2d 340, 342-343 (7th Cir. 1985); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983); Foster v. Arcata Associates, Inc., 772 F.2d 1453,

1460 (9th Cir. 1985). See also Grano v. Department of Development of the City of Columbus, 637 F.2d 1073, 1079 (6th Cir. 1980).

Second, although in the present case the trial went beyond the stage of proving a prima facie case (see, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)), the approval by the Fourth Circuit of the instruction is in conflict with the law of two other circuits. Thus, in Hawkins v. Anheuser-Busch, Inc., 697 F.2d at 813-15, the Eighth Circuit held that although the defendant had rebutted the prima facie case by articulating the selectees' superior qualifications, the explanation was shown to be a pretext because the plaintiff proved that she was at least as qualified for the position. Thus, under Hawkins, in the appropriate circumstances a showing of equal qualifications would

be sufficient to prove the Title VII claim because it would demonstrate the pretextual nature of the proffered explanation.

Similarly, in Joshi v. Florida State University Health Center, 760 F.2d 1227, 1235 (11th Cir. 1985), the Eleventh Circuit held that the relative qualifications of the persons hired could not be the reason for the defendant's failure to hire the plaintiff since she was not actively considered for the position. Here also there was ample evidence from which a properly instructed jury could have found that plaintiff had never been seriously considered for the promotion and had been prevented from being so because of a discriminatory denial of training. Such a conclusion was foreclosed by the district court's instruction that the plaintiff could not win unless she proved that she was more

qualified than the selectee.

In summary, the district court's instruction that proof of superior qualifications was an absolute requirement for the plaintiff's case conflicts with the law in five other circuits. The issue of the question of relative qualifications is a recurring one in the lower courts. See United States Postal Service v. Aikens, 460 U.S. at 713. Given both the conflict in circuits and the recurrence and importance of the issue, certiorari should be granted to resolve it in the present case.

CONCLUSION

For the foregoing reasons certiorari should be granted and the decision of the court below reversed.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2394

Brenda Patterson,

Appellant,

versus

McLean Credit Union,

Appellee.

Appeal from the United States District
Court for the Middle District of North
Carolina, at Winston-Salem. Hiram H.
Ward, Chief District Judge. (84-0073)

Argued October 9, 1986. Decided November
25, 1986

Before WIDENER and PHILLIPS, Circuit
Judges, and HAYNSWORTH, Senior Circuit
Judge.

Harold L. Kennedy, III; Harvey L. Kennedy (Kennedy, Kennedy, Kennedy and Kennedy on brief) for Appellant; N. Lee Davis, Jr. (George E. Doughton, Jr.; Hutchins Tyndall, Doughton and Moore on brief for Appellee.

PHILLIPS, Circuit Judge:

In this action the plaintiff, Brenda Patterson, sued her employer, McLean Credit Union (McLean), on claims, under 42 U.S.C. § 1981, of racial harassment, and failure to promote and discharge, together with a pendent state claim for intentional infliction of mental and emotional distress.* The district court submitted the § 1981 discharge and promotion claims to the jury which returned a verdict in favor of McLean, and granted

* Presumably for statute of limitations reasons, Patterson did not assert a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq.

directed verdicts to McLean on the § 1981 racial harassment claim and on the pendent state claim for intentional infliction of mental and emotional distress. We hold that the claim for racial harassment was not cognizable under 1981; that the evidence was insufficient to support the pendent state claim; and that the court did not err in its jury instructions nor in its evidentiary rulings on the submitted claims under 1981. We therefore affirm.

I.

Brenda Patterson, a black woman, was an employee of McLean Credit Union from May 5, 1972 to July 19, 1982, when she was laid off. Robert Stevenson, McLean's president, hired Patterson to be a teller and file coordinator. According to Patterson's testimony, when he hired her,

Stevenson told Patterson that the other women in the office, who were white, probably would not like her because she was black. During her ten years of employment with McLean, Patterson experienced treatment that she considered to be racially motivated harassment by Stevenson. She testified that he periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping and dusting, jobs not given to white employees. On one occasion, she testified, Stevenson told Patterson that blacks are known to work slower than whites. According to Patterson, Stevenson also criticized her in staff meetings while not similarly criticizing

white employees.

Patterson never was promoted from her position as teller and file coordinator throughout her tenure at McLean. Susan Williamson, a white employee who was hired by McLean in 1974 as an accounting clerk, received a title change from "Account Junior" to "Account Intermediate" in 1982. This title change entailed no change of responsibility. Patterson asserted that Williamson's title change was a promotion that Patterson herself should have received, based primarily on her seniority over Williamson. Patterson also claimed that her 1982 layoff was discriminatory because white employees with less experience kept their jobs.

Patterson based her § 1981 claims and her state claim of intentional

infliction of mental and emotional distress on the evidence above summarized. The district court held that a claim for racial harassment is not cognizable under § 1981, and refused to submit that claim to the jury. Examining North Carolina case law applicable to Patterson's pendent state claim, the district court concluded that Stevenson's treatment of Patterson did not rise to the level of outrageousness required under state law for recovery for intentional infliction of emotional distress and directed a verdict against Patterson on that claim. The court submitted the 1981 claims for discriminatory failure to promote and discharge to the jury, which returned a verdict for McLean. This appeal followed.

II.

Patterson first challenges the court's refusal to submit her related claims for racial harassment and intentional infliction of mental and emotional distress to the jury.

A.

We hold, in agreement with the district court, that Patterson's claim for racial harassment is not cognizable under § 1981, which provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." That racial harassment claims are cognizable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), does not persuade us otherwise. The broader language of Title VII, which

makes unlawful "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race," 42 U.S.C. § 2000 (e)(2)(a) (emphasis added), stands in critical contrast to § 1981's more narrow prohibition of discrimination in the making and enforcing of contracts. Cf. United States v. Buffalo, 497 F. Supp. 612, 631 (W.D.N.Y. 1978) (the intentionally broad provisions of Title VII accommodate claims based on having to work in a racially discriminatory environment), modified on other grounds, 633 F.2d 643 (2d Cir. 1980). Claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protec-

tion. Instances of racial harassment, on the other hand, may implicate the terms and conditions of employment under Title VII, see e.g., EEOC v. Murphy Motor Freight, 488 F. Supp. 381, 384-86 (D. Minn. 1980), and of course may be probative of the discriminatory intent required to be shown in a § 1981 action, see e.g., Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984), but, standing alone, racial harassment does not abridge the "right to make" and "enforce" contracts - including personal service contracts - conferred by § 1981.

The cases relied on by Patterson are not to the contrary. None directly holds that racial harassment gives rise to a discrete claim under § 1981, as distinguished from recognizing that racial harassment may be relevant as evidence of

discriminatory intent supporting a cognizable claim of employment discrimination under § 1981 and that it may give rise to a discrete Title VII claim. See Murphy Motor Freight, 442 F. Supp. at 384 (Title VII claim for racial harassment); Buffalo, 497 F. Supp. at 632-35, 636-37 (discriminatory work environment claim under Title VII; 1981 claims of discriminatory assignment and termination). But cf. Goodman v. Lukens Steel Co., 980 F. Supp. 1114, 1164 (E.D. Pa. 1994) (very generally citing § 1981, along with Title VII, as a basis for a claim of racial harassment) Crocker v. Boeing Co., 437 F. Supp. 1138, 1191-92, 1193-94, 1195, 1198 (E.D. Pa. 1977) (discussing racial harassment claim only under Title VII, but indicating liability based upon both Title VII and § 1981 in order),

modified on other grounds, 662 F.2d 979 (3d Cir. 1981).

We therefore affirm the district court's grant of directed verdict in Patterson's claim of racial harassment under § 1981.

B.

We also agree with the district court that Patterson's evidence was not sufficient to support submission of her pendent state claim of intentional infliction of mental and emotional distress. The essential elements of such a claim under North Carolina law are (1) extreme, outrageous conduct, (2) intended to cause and causing (3) severe emotional distress. E.g., Dickens v. Puryear, 276 S.Ed.2d 325, 335 (N.C. 1981). The district court ruled that given its most favorable reading, Patterson's evidence

of McLean's conduct did not rise to the level of outrageousness and extremity required by the North Carolina courts to allow recovery under this cause of action. We agree with this assessment. The standard of "outrageousness" established in the relatively few state court decisions is understandably a stringent one. Recovery under that standard has been permitted only for conduct far more egregious than any charged to McLean in Patterson's evidence.

For example, in Woodruff v. Miller, 307 S.Ed.2d 187, 178 (N.C. App. 1983), recovery was permitted where a defendant had employed what the court characterized as "truculent, vindictive methods" inspired by a "consuming animus against plaintiff" to circulate a thirty year old record of plaintiff's nolo contendere

plea to a criminal charge, had compared plaintiff to dangerous fugitives, and had taken open delight in plaintiff's resulting mental disturbance.

In Dickens, recovery was permitted against a defendant who had assaulted plaintiff and threatened to kill him unless he left the state.

Of particular relevance is Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. App. 1986), in which one of three female plaintiffs recovered for intentional infliction of emotional distress when a fellow employee of her employer-defendant screamed and shouted at her, engaged in non-consensual and intimate sexual touching, made sexual remarks, and threatened her with a knife. Significantly, the two other plaintiffs were denied recovery though the same fellow

employee had screamed, shouted, and thrown a menu at one of them and had given strenuous work to and denied the request of another, who was pregnant, to leave work when she thought she was in labor.

Evaluated in light of the stringent standard established by these decisions, the conduct of McLean through its president, Stevenson, was not "extreme and outrageous." That Stevenson stared at Patterson often, gave her too much work, required her to sweep and dust, and commented that blacks are slower than whites are facts that, though patently unworthy if true, fall far short of those in any North Carolina decision finding "extreme and outrageous" conduct under this state tort cause of action.

We therefore affirm the district courts grant of directed verdict on this claim.

III.—

Patterson next challenges the exclusion of proffered testimony by two witnesses in support of her submitted claims of employment discrimination under § 1981 and a jury instruction respecting claimant's burden of proof on her promotion claim.

Marie Roseboro was tendered as an expert in personnel administration and would have given an opinion that Patterson was better qualified than Susan Williamson for the "promotion" given the latter. The district court refused to admit this proffered testimony on the basis that it did not meet the requirement of Fed. R. Evid. 702 that expert

testimony be helpful to the trier of fact.

The court also excluded the lay testimony of another black woman formerly employed by McLean, Anita Reid Stovall, to the effect that she had experienced harassment by Stevenson during her employment in 1972. The court ruled this testimony inadmissible under Fed. R. Evid. 403, finding its probative value on the issue of discriminatory intent outweighed by its remoteness in time and its potential to confuse and mislead the jury.

There was no abuse of discretion in the trial court's decision to exclude the testimony of these two tendered witnesses. Because of the remoteness in time of the events to which Stovall would have testified, the probative value of

that evidence would have been slight and the court could properly conclude that its slight value was outweighed by the likelihood of confusion it might create on the issue on which it was tendered. See Fed. R. Evid. 403.

The district court also could properly conclude that Roseboro's proffered testimony regarding the relative qualifications of Patterson and other McLean employees would not be helpful to the jury so as to justify its admission as expert opinion under Fed. R. Evid. 702. The trial court's conclusion that the jury needed no aid in making a finding on the relative qualifications of clerical employees at a credit union, a comparison that is not a highly technical or complicated one, was not an abuse of its discretion.

IV

Finally, Patterson complains that the trial court erroneously instructed the jury that in order for her to prevail on her promotion discrimination claim, she had to show that she was more qualified than Susan Williamson. There was no error in the instruction given.

An employee claiming race discrimination in employment decision under § 1981 must prove intentional discrimination. Such a claim is therefore comparable to the individual disparate treatment claim under Title VII. The disparate treatment proof scheme developed for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its progeny, may properly be transposed, as here, to the jury trial of a § 1981 claim. See Carter, 727 F.2d at 1232.

Under that scheme, once an employer had advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual, that race discrimination is the real reason.

That was the situation here, and the district court therefore properly instructed the jury that the burden was upon the claimant to prove her superior qualifications by way of proving race discrimination as the effective cause of the denial to her of "promotion." See Young v. Lehman, 748 F.2d 194, 197-98 (4th Cir. 1984); see also Losh v. Textile Ind., 600 F.2d 1003, 1010, 1016 (1st Cir. 1979) (effect on jury instructions of

transposing McDonnell Douglas proof scheme to jury trial of ADEA claim). This simply reflects the principle established in Title VII cases that an employer may, without illegally discriminating, choose among equally qualified employees notwithstanding some may be members of a protected minority. See Anderson v. City of Bessemer City, 717 F.2d 149, 154 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

The court's instructions here were therefore proper.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2394

BRENDA PATTERSON,

Plaintiff-Appellant,

VERSUS

MCLEAN CREDIT UNION,

Defendant-Appellee.

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the

petition for rehearing and the response thereto and is of opinion the petition is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Haynsworth.

/s/ H. E. Widener, Jr.

For the Court

Filed: March 19, 1987.

ORAL FILING OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

| | | |
|----------------------|---|------------------|
| BRENDA PATTERSON, |) | CIVIL ACTION NO. |
| Plaintiff |) | C-84-73-WB |
| |) | |
| vs. |) | |
| |) | |
| WULEAN CREDIT UNION, |) | |
| Defendant |) | |
| |) | |

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE HIRSH H. WARD, and a

jury

Vol. 3 of 8

* * *

MR. KENNEDY: Your Honor, I'd like to address, if I could, that one claim that -- it was assumed in the other two claims -- but really, under the law, racial harassment or failure to have a working environment free of racial prejudice is a separate thing.

THE COURT: Yes, I understand that, and this is a 1981 case -- and if the jury finds a history of racial harassment which culminated in failure to promote and discharge of the plaintiff, they can take that into consideration. But it is not a separate claim under Title -- under Section 1981, in my opinion, in the context of this case.

MR. KENNEDY: We cited some cases similar to the case at bar here in our brief --

THE COURT: Yes, sir, they are all Title VII cases, aren't they?

MR. KENNEDY: But, Your Honor, that, to me, when I look at --

THE COURT: Well, it isn't to me, and I've already ruled on it, so that's the way its going to go. I'm going to let the promotional claim go to the jury,

and I'm going to let the layoff and subsequent termination claim go to the jury, and I'm dismissing the rest of the claims.

(Pages 3-75-3-76.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

BRENDA PATTERSON,

Plaintiff



C-84-73-WB

MCLEAN CREDIT UNION,

Defendant

JUDGMENT

This case came on for trial before the Court and a jury on November 12-18, 1985, and the issues having been duly tried and answered by the jury as follows:

1. Did defendant unlawfully discriminate against plaintiff because of her race, in violation of 42 U.S.C. § 1981:

a. by denying plaintiff a promotion received by Susan Howard Williamson?

Answer: No
(Yes or No)

b. by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

Answer: No
(Yes or No)

2. If defendant did unlawfully discriminate against plaintiff, what amount of compensatory damages, if any, is plaintiff entitled to recover:

a. for defendant's denying plaintiff a promotion received by Susan Howard Williamson?

Answer: _____
(Amount)

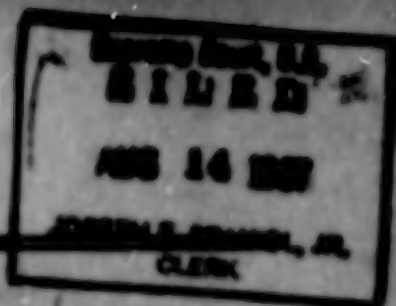
b. for defendant's laying off

3. If plaintiff was discriminated against in her employment because of her race, and the defendant's actions in so doing were malicious, wanton, or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from defendant?

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing on her claims against the defendant and that this action be, and the same hereby is, DISMISSED.

November 20, 1985.

No. 87-137



In The
Supreme Court of the United States

October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

**ON PETITION FOR A WRIT
OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF OF RESPONDENT
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether a separate claim for racial harrassment must be submitted to the jury under 42 U.S.C. Section 1981, independent of a claim for discriminatory promotion and discharge?

2. Whether the Plaintiff in a claim under 42 U.S.C. Section 1981 has the burden of proof of showing that she was better qualified than another employee who was promoted after the employer has offered evidence that relative qualifications were the basis of such promotion and that the employee promoted was more qualified.

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No. 87-107

In The
Supreme Court of the United States

October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

**ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF OF RESPONDENT
IN OPPOSITION**

The Respondent, McLean Credit Union, opposes Petitioner's Request for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and respectfully submits this Response:

STATEMENT OF FACTS

Petitioner was employed by Respondent in 1972 as a File Co-ordinator and terminated in 1982. Susan Williamson, a white, was hired by the Respondent in 1974 as an Accounting Clerk.¹ Between 1972 and 1982 the maximum number of such employees employed by the Respondent was nine, including the Petitioner.²

During her employment at McLean, Petitioner never asked or made any inquiry for any promotion to or training for an accounting position or any other position.³ During Williamson's employment at McLean, she worked solely in the accounting area.⁴

In 1982, Williamson received a title change from "Account Junior" to "Account Intermediate." There were no changes in Williamson's job responsibilities, functions or supervisor subsequent to the "promotion." There was no job vacancy before or after Williamson's "promotion." The Respondent hired no other employees after Williamson's "promotion." Williamson received a pay increase and title change but continued her same duties.⁵

Petitioner had no experience, aptitude or qualifications to perform the Accountant job. Evidence showed that Williamson was more qualified than Petitioner to do each job function required for the accounting position.⁶

¹Transcript of Trial, Vol. 3 at p. 105.

²*Id.*, Vol. 3 at p. 83.

³*Id.*, Vol. 2 at pp. 61-62.

⁴*Id.*, Vol. 2 at p. 53.

⁵Tr. of Trial, Vol. 4 at pp. 26-28.

⁶*Id.*, Vol. 4 at pp. 28-30.

Each year from 1980 through 1984, Williamson's annual evaluations exceeded Petitioner's.⁷

Petitioner's application test showed that Petitioner attempted to answer only 4 of the 15 mathematics questions, only one of which was correctly answered.⁸

When Petitioner worked part-time as a teller, she indicated to the President of McLean that such work was too much pressure. There was evidence that Petitioner was not good at "balancing" and made numerous errors. Petitioner indicated that she did not want to do teller work.⁹ Further, the accounting positions required more numerical aptitude and bookkeeping skills than the teller position which Petitioner could not adequately perform.¹⁰

Petitioner alleges that she was discriminated against because of the "promotion" received by Williamson.¹¹

The record reflects only two allegations of racial remarks. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women.¹² The only other statement which Petitioner testified was a racial remark was the statement allegedly attributed to Respondent's President that—"blacks were slower than whites

⁷*Id.*, Vol. 4 at pp. 33-35.

⁸*Id.*, Vol. 4 at pp. 95-97; Trial Exhibit 21.

⁹*Id.*, Vol. 3 at pp. 103-104.

¹⁰*Id.*, Vol. 4 at pp. 37-38.

¹¹*Id.*, Vol. 1 at pp. 46-48.

¹²*Id.*, Vol. 1 at p. 19. (Although this alleged instance is far outside the applicable three year statute of limitations, the District Court allowed the testimony as background and to support the element of "intent" required in a Section 1981 case.)

by nature."¹³ Although Petitioner complains that she received personal criticism during staff meetings, the record is clear that such criticisms were business related, were made without personal comment and admittedly reflected errors which she had made prior to the date of the meeting.¹⁴

There was no formal training available to any clerical employee and no employee including Williamson received any job training that was not available to all employees.¹⁵

Petitioner misleads the Court by asserting that she was "unable to find out about promotions that were available" and that "a number of white employees were promoted over her who had less education and seniority."¹⁶ In fact Petitioner offered evidence at trial of only one promotion for which she contended she was the object of racial discrimination—that of Williamson to the position of Account Intermediate.¹⁷ Further Petitioner offered no evidence that either education or seniority were criteria used by Respondent in making promotions.¹⁸

¹³*Id.*, Vol. 1 at p. 88.

¹⁴*Id.*, Vol. 1 at p. 89; Vol. 2 at pp. 72-78.

¹⁵The only evidence offered by the Petitioner of discriminatory training opportunities was her own direct testimony consisting of a single unsubstantiated allegation that Williamson "was given special training for this position." (*Id.*, Vol. 1, p. 49). Petitioner offered no evidence describing what this "special training" consisted of. In contradiction, the Respondent showed that Williamson did not receive any special training. (*Id.*, Vol. 4, pp. 28, 30), and that the employer had no formal training programs (*Id.*, Vol. 4, p. 38).

¹⁶Petition at p. 9.

¹⁷Transcript of Trial at Vol. 1 at pp. 46-47.

¹⁸Nevertheless, greater education and seniority do not outweigh more direct experience. *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984), cert. denied, 471 U.S. 1061 (1985).

REASONS FOR DENYING THE WRIT

The Fourth Circuit Court of Appeals has ruled that a separate independent claim for racial harassment is not cognizable under 42 U.S.C. Section 1981.¹⁹ This ruling is not in conflict with any Circuit Court decision or any decision of this Court. The Fourth Circuit decision does not change existing law that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under Section 1981, and that it may give rise to a discrete claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.²⁰ Petitioner has cited no case to the Court which holds that a separate issue of racial harassment should be submitted to the jury in a Section 1981 case, except in cases where a parallel cause of action has been brought under Title VII. Petitioner declined to bring a parallel cause of action under Title VII. However, Petitioner presented evidence of alleged racial harassment to support her claims for discrimination in promotion and layoff and an issue of punitive damages was submitted to the jury.²¹

Regarding the jury charge on the issue of relative qualifications, Petitioner concedes that the District Court correctly relied on prior Fourth Circuit precedents.²² Although Petitioner contends there are holdings contrary to

¹⁹Appendix to Petition at p. 7a, *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986).

²⁰See, e.g. *EEOC v. Murphy Motor Freight*, 488 F.Supp. 381, 384 (D.Minn. 1980); *United States v. Buffalo*, 457 F.Supp. 612, 632-637 (W.D.N.Y. 1978).

²¹Appendix to Petition at p. 28a.

²²Petition at p. 6.

the Fourth Circuit Rule, a true analysis of the cases cited shows otherwise. Respondents submit that the Petitioner has cited no case in conflict with the charge given by the District Court.

I.

THE FOURTH CIRCUIT'S RULING THAT A SEPARATE CLAIM FOR RACIAL HARASSMENT WAS NOT COGNIZABLE UNDER SECTION 1981 IS NOT INCONSISTENT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Petitioner cites several cases in support of her contention that the ruling of the Fourth Circuit is in conflict with the decisions of Federal Courts. Respondent contends that these cases are no more enlightening than other cases previously cited by the claimant and about which the Fourth Circuit observed: "none directly holds that racial harassment gives rise to a discrete claim under Section 1981 as distinguished from recognizing that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under Section 1981 and that it may give rise to a discrete Title VII claim."²³

In *Hamilton v. Rogers*, 791 F.2d 439 (5th Cir. 1986), the claimant brought claims under Sections 1981, 1983 and Title VII for alleged racial harassment and retaliation. The Court (on rehearing) held that the employer was liable only under Title VII. *Id.* at 445.

²³Appendix to Petition at pp. 9a-10a, *Patterson*, 805 F.2d at 1146.

In support of her contentions, Petitioner misstates and misuses a partial quote from *Hamilton* as follows: "an offensive work environment caused by racial harassment 'would . . . establish a successful case under 42 U.S.C. Sections 1981 and 1983 . . .'"²⁴ A complete reading of the appropriate part of the Opinion shows that the Court is restating the familiar *McDonnell-Douglas*²⁵ proof scheme. The Court concludes its analysis by stating: "Successfully meeting these requirements [the *McDonnell-Douglas* proof scheme] would also establish a successful case under 42 U.S.C. Sections 1981 and 1983; when these Statutes are used as *parallel causes of action with Title VII*, they require the same proof to show liability." *Id.* at 442. (Emphasis added). *Hamilton* holds only that the *McDonnell-Douglas* proof scheme is applicable to proof of Section 1981 claims, not that Section 1981 requires submission of a separate issue of racial harassment.

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) is cited for the proposition that compensatory damages for humiliation and other emotional harm resulting from "the atmosphere of harassment" were appropriate.²⁶ Respondents do not take issue with this specific statement of law. However, the issues presented to the jury in *Carter* are not set forth in the Opinion and there is certainly no holding that a specific, independent, issue for racial harassment must be submitted to the jury in a Section 1981 claim.

²⁴Petition at pp. 13-14.

²⁵*McDonnell-Douglas Corp. v. Greene*, 411 U.S. 792 (1973).

²⁶Petition at p. 14.

In fact, the *Carter* Court discusses in detail the probability that the judgment was substantially comprised of actual damages for compensation differential and a small remainder accounting for the humiliation and emotional harm incidental thereto. *Carter*, 727 F.2d at 1238. The implication is that a single issue was presented concerning Plaintiff's claim for intentional discrimination under Section 1981, said issue inclusive of Plaintiff's alleged claims of racially discriminatory hiring, firing, promotion and compensation differential, as well as intangible injuries suffered because of humiliation and emotional harm.

The Respondent does not contend that humiliation is not a compensable injury under Section 1981, only that any damages therefore are incidental to and must arise from activities prohibited by Section 1981. If the jury in the case at bar had answered affirmatively the issues against the Respondent with regard to Petitioner's claim for discrimination in layoff and promotion, then the jury could have properly awarded (if the facts supported) damages for racial harassment. This the jury declined to do.

In *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985), the Plaintiff alleged that the Defendant violated Section 1981 by subjecting him to terms and conditions of employment different from those that applied to non-minority employees. In particular, the Plaintiff alleged improper layoff, denial of requests to fill job openings, discriminatory disciplinary measures and racial harassment. The jury affirmatively answered two issues: "... [1] Whether Defendant intentionally subjected Plaintiff to different terms and conditions of employment because of his race; and, [2] ... whether Defendant's conduct was malicious, wanton or oppressive." *Id.* at 1306.

One issue was presented to the jury under Section 1981 encompassing all of Plaintiff's claims and there is no holding by the Court that an issue of racial harassment must be submitted to the jury separate from issues concerning improper layoff or failure to promote. The issue in *Ramsey* is phrased differently than the issues presented in the case at bar, but the substance is the same. Any alleged racial harassment is included with the issues of improper layoff and promotion. In the case at bar, the District Court allowed evidence of racial harassment and charged the jury regarding damages for humiliation, embarrassment, anxiety and emotional distress.¹⁷

Plaintiff cites *Block v. R.H. Macy and Co.*, 712 F.2d 1241 (8th Cir. 1983) in support of her contention that recovery is permitted under Section 1981 for emotional distress caused by racial harassment in employment. Respondent does not contend otherwise where, as in *Block*, the fact finder has determined that there was an improper discharge or a collateral finding of a violation of Title VII. *Block* was prosecuted under both Title VII and Section 1981 and Respondent is aware of no Section 1981 cases from the Eighth Circuit which require an independent issue of racial harassment to be submitted in a Section 1981 case absent a parallel cause of action for an alleged violation of Title VII.

In *Block*, the Circuit Court affirmed the award of compensatory and punitive damages under Section 1981 as compensation for Plaintiff's discharge from employment resulting from racial discrimination.

¹⁷Tr. of Trial, Vol. 5, pp. 18-19.

Likewise, in *Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986), the opinion of the Court does not specifically indicate that a separate issue of racial harassment was submitted to the jury under Section 1981. The clear implication is that the issue presented by the Plaintiff was whether he was intentionally discriminated against by reason of his discharge. *Id.* at 914. The specific incidences of discrimination outlined by the Court, *Id.* at 915, and cited by the Petitioner,²⁸ may be evidence of discrimination, but do not require the submission of a separate issue of racial harassment under Section 1981.

Plaintiff has failed to cite any case holding that a separate issue of racial harassment is cognizable under Section 1981 and has failed to cite any case inconsistent with the opinion of the Fourth Circuit.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH OTHER DECISIONS OF THIS COURT.

Goodman v. Lukens Steel Co., 580 F.Supp. (E.D.Pa. 1984), modified 777 F.2d 113 (3rd Cir. 1986), *aff'd*, 55 U.S.L.W. 4881 (1987) is prosecuted under both Section 1981 and Title VII. There is no holding that an individual Plaintiff is entitled to a separate discrete issue of disparate treatment when prosecuting a case under Section 1981 alone. The District Court specifically indicated that disparate impact was not actionable under Section 1981. 580 F. Supp. at 1121. By implication, disparate treatment

²⁸See, Petition at p. 15, n.14.

cases are likewise barred under Section 1981 and should be brought under Title VII.

In *Howard v. Lockheed Georgia Co.*, 372 F. Supp. 854 (N.D. Ga. 1974), the Court rejected an attempt to use Section 1981 for the purpose of seeking emotional distress damages.²⁹

Skaare Tefila Congregation v. Cobb, 55 U.S.L.W. 4629 (1987) holds only that Jews were among the peoples considered to be distinct races, and therefore, within the protection of Section 1982. *Skaare Tefila Congregation* is not relevant to the case at bar.

Petitioner also cites *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), for the proposition that the terms, conditions and privileges of employment clearly include benefits that are part of an employment contract. However, *Hishon* was prosecuted solely under Title VII.

Petitioner was not without a remedy for any alleged racial harassment or disparate treatment for she could have brought a claim under Title VII. Having declined or failed to bring a Title VII action, she now asks this Court to allow her relief under Section 1981, which would effectively by-pass the purposes of Title VII.

²⁹The Court stated:

"[T]o judicially legislate a current and broader remedy under Section 1981 would invite every Plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII. Why should a Claimant genuinely participate in the conciliation procedures of Title VII, or his attorney advise him to do so, when larger awards await if he refuses and proceeds to suit? Such a holding would frustrate the clear intent of Congress that racial bias problems be resolved by conciliation. This the Court declines to do."

372 F. Supp. at 857-858.

III.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS RELATING TO THE BURDEN OF PROOF DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Does Not Conflict With Texas Department of Correction v. Burdine.

The District Court instructed the jury that in order for the Petitioner to prevail upon the issue of promotion discrimination, it was necessary that she prove that she was more qualified to receive the promotion than the person receiving such promotion and that under Section 1981 she must show intentional discrimination. The Petition correctly states that the District Court relied on prior Fourth Circuit precedents and that therefore the instruction was correct.¹⁰

However, Petitioner is incorrect in her contention that these instructions and Fourth Circuit cases¹¹ are in conflict with the holdings of this Court and other circuits. In support of her contention, Petitioner cites *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, it was unanimously held that after the Plaintiff in a job discrimination suit under Title VII had proved a *prima facie* case of discrimination, the Defendant bears only the burden to articulate some legitimate non-discriminatory reason for its actions and need

¹⁰Petition at p. 6.

¹¹*Young v. Lehman*, 748 F.2d 194 (4th Cir. 1984) cert. denied, 471 U.S. 1061 (1985); *Anderson v. City of Bessemer City*, 717 F.2d 149 (4th Cir. 1983), rev'd on other grounds, 470 U.S. 564 (1985).

not prove either the existence of such reasons by a preponderance of the evidence or that the person selected instead of the Plaintiff was better qualified. *Id.* at 253-254. In effect, the *Burdine* Court relaxed the burden placed upon the employer by the Fifth Circuit Court of Appeals which required the employer to show that the Plaintiff's objective qualifications were inferior to those of the person selected. This Court rejected that rule and reiterated that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* at 259.

If the employer has the discretion to choose between equally qualified candidates, and there is no evidence of unlawful criteria, then surely it is incumbent upon a plaintiff to show that she is "more qualified" in order to prevail, where she has offered no other evidence of pretext.

B. The Decision Below Is Not In Conflict With The Decisions Of Other Circuits.

Respondent is aware of no holdings from other circuits in conflict with the Fourth Circuit Rule or the charge given by the District Court.

First, the Petition implies that the District Court Judge instructed the jury that the Plaintiff must show that she was better qualified than the person who received the promotion in order to make out a *prima facie* case.¹² In fact, the Trial Judge, outside the hearing of the jury, stated to counsel that "the law in the Fourth Circuit seems to be that in order to make out a *prima facie* case

¹²Petition at p. 5 n. 2; *Id.* at p. 29.

you must show that you are better qualified than the person who received the promotion."³³

Although Petitioner has seized on this statement by the Court as an apparent misstatement of the law, such comments by the Court are not pertinent because they were made outside the hearing of the jury and because once such a case has been fully tried on the merits the question whether the Plaintiff has established a *prima facie* case is no longer relevant. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983); *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985).

Secondly, Petitioner contends that she does not have to show superior qualifications after relative qualifications are proffered by the employer as rebuttal.³⁴ However, all of the cases cited by the Petitioner address the issue of the initial burden of establishing a *prima facie* case and are totally irrelevant to the case at bar. Respondent does not dispute that the law requires a Plaintiff to prove only that she is qualified for the position in order to establish a *prima facie* case; but such statement of law is irrelevant because this case went beyond the *prima facie* stage and Respondent offered relative qualifications as a non discriminatory reason for its decision. To rebut, Petitioner must show that she is "more qualified" or some

³³Tr. of Trial, Vol. 5 at pp. 29-31.

³⁴In support Petitioner cites: *Mitchell*, 759 F.2d 80; *Christensen v. Equitable Life Assurance Soc'y of United States*, 767 F.2d 340, 342-343 (7th Cir. 1985), cert. denied 106 S.Ct. 885 (1986); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983); *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1460 (9th Cir. 1985) cert. denied, 106 S.Ct. 1267 (1986); *Grano v. Department of Dev. of The City of Columbus*, 637 F.2d 1073, 1079 (6th Cir. 1980).

other pretext on the part of the employer or some other unlawful criteria.

The District Court correctly instructed the jury in accordance with the Fourth Circuit rule and the Petitioner has cited no contrary rule.

Further, *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983) does not, as Petitioner suggests, hold that a showing of equal qualifications is necessarily sufficient to demonstrate pretext. Nor, does *Hawkins* hold contrary to the Fourth Circuit Rule that once an employer has proffered relative qualifications as a non discriminatory reason for its action, then it is incumbent upon the Plaintiff to show that she is more qualified than the successful candidate. In *Hawkins*, the trial Judge found that the Plaintiff was qualified, and that after her application was rejected, the employer continued to seek applicants with similar qualifications to those of the Plaintiff³⁵. *Id.* at 813.

Likewise, in *Joshi v. Florida State Univ. Health Center*, 763 F.2d 1227, 1235 (11th Cir.) cert. denied, 106 S.Ct. 347 (1985), the facts are distinguishable from the facts of this case. In *Joshi*, the employer failed to rebut the *prima facie* case, because they failed to show that relative qualifications of the applicants were considered. In the case at bar, the Respondent more than re-

³⁵The Court made a Finding of Fact that under the evidence presented, the explanation proffered by the employer was pretextual because the employer continued to seek other applicants with similar qualifications. Those facts are distinguishable from the case at bar where Williamson received only a title change, there was no job vacancy and Petitioner was not qualified for the position (See n.5, *supra*).

butted the Petitioner's *prima facie* case with substantial evidence of vastly superior qualifications by Ms. Williamson.³⁶ In fact, Respondent strongly questions whether Petitioner presented a *prima facie* case or was entitled to survive a Motion for Directed Verdict because of her failure to show even that she was qualified for the position.³⁷ The employer has the right to fix the qualifications that are necessary or preferred in selecting an employee for promotion, and in order to make out a *prima facie* case, a Plaintiff must establish that she meets these qualifications. *E.E.O.C. vs. Federal Reserve Bank of Richmond*, 698 F.2d 633, 671 (4th Cir. 1983) *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984).

Although Petitioner claims that she was prevented from being considered for the "promotion" because of a discriminatory denial of training, the record offers no support for such contentions.³⁸ Further Petitioner offers no authority in support of such contention. However, even assuming the existence of such authority, it would not be relevant to these facts where there was no evidence of any training to any clerical employees.

³⁶See, n. 4-6, *supra*.

³⁷See n. 7-10, *supra*.

³⁸See n. 15, *supra*.

CONCLUSION

For the reasons stated, the Petition should be denied and the Opinion of the United States Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit's decision is not in conflict with the decisions of this Court or any Circuit Court of Appeals.

Respectfully submitted,

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SEP 5 1987

SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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No. 87-107

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
vs.
MCLEAN CREDIT UNION,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

I.

THE RACIAL HARASSMENT CLAIM

Respondent fails to articulate any
legal theory or principle that would
justify the exclusion of a cause of

action for racial harassment from Section 1981's comprehensive coverage. Instead, in an attempt to distinguish away the conflict between the Fourth Circuit's decision below and the several federal courts of appeals that have upheld a Section 1981 cause of action for racial harassment, respondent seizes on two irrelevant factual differences alleged to exist between the cases. First, respondent attempts to distinguish one of the cases relied upon by plaintiff on the ground that the Section 1981 claim for racial harassment was joined with a parallel claim of racial harassment under Title VII. See, e.g., Brief for Respondent, at 7 (discussing Hamilton v. Rogers, 791 F.2d 439 (5th Cir. 1986)). See also Brief for Respondent, at 11. Second, respondent distinguishes several other decisions that conflict with the

ruling below on the ground that the racial harassment claim in those cases allegedly was joined with another claim of discrimination, for discharge or failure to promote.

Respondent fails to explain why the factual distinctions to which it points have any relevance to the legal holdings of the cases cited by plaintiff. It is the holdings of several courts of appeals that Section 1981 encompasses racial harassment that conflict with the Fourth Circuit's ruling below. The fact that the Section 1981 claim for racial harassment was joined with some other type of claim is no more relevant to the circuits' holdings concerning Section 1981's coverage than is the fact that the instant case involved a bank clerk, while the cases upholding section 1981's coverage of racial harassment involved a

firefighter, Hamilton v. Rogers; a sample librarian, Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984); an Insulmat operator, Ransay v. American Air Filter Co., 772 F.2d 1303, 1306 (7th Cir. 1985); and a sales associate, Block v. R. H. Macy & Co., 712 F.2d 1241, 1243 (8th Cir. 1983). As discussed in more detail below, none of the decisions that has upheld a Section 1981 claim for racial harassment indicates that the holding was contingent upon joinder with another type of claim. Moreover, any theory that tempted to justify such a distinction would squarely conflict with this Court's prior decisions.

Respondent attempts to distinguish the ruling in Hamilton v. Rogers, 791 F.2d at 442, that section 1981 encompasses an "offensive work environment" caused by racial harassment,

on the ground the Section 1981 claim was joined with a parallel claim under Title VII. See Brief for Respondent, at 7. Respondent elsewhere argues that permitting an independent Section 1981 claim for racial harassment would "effectively by-pass the purposes of Title VII." Brief for Respondent, at 11.

The decision in Hamilton v. Rogers makes clear that the court gave independent effect to the Section 1981 claim, in addition to the Title VII remedies for racial harassment. Compensatory damages for emotional injury are not available under Title VII. Nonetheless, the court held that an award for such injury was available under sections 1981 and 1983 for plaintiff's "embarrassment, humiliation, and mental distress from his work environment." 791

F.2d at 442-43, 444 (emphasis added).¹

Respondent's strained attempt to distinguish Hamilton v. Rogers would mean that even though Section 1981 provides a separate and additional remedy for racial harassment, this remedy would not be available unless the Section 1981 claim was joined with a parallel Title VII claim. However, this interpretation of Hamilton v. Rogers squarely conflicts with the Court's ruling in Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975), that all remedies provided by Section 1981 are separate and independent from Title VII remedies that may exist for similar conduct.

¹ Respondent incorrectly states that the Court in Hamilton held the employer liable only under Title VII. Brief for Respondent, at 6. In fact, the plaintiff's supervisors, who were determined to be an employer, were held liable for compensatory damages under Sections 1981 and 1983. See 791 F.2d at 442-43, 444.

In Johnson, the Court rejected the argument that Title VII pre-empts a parallel Section 1981 claim. In that case, the Court held that the timely filing of a charge with the EEOC under Title VII did not toll the running of the limitations period for a Section 1981 claim based upon the same facts. *Id.* at 466. The Court concluded that "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Id.* at 466 (emphasis added). See also Brown v. GSA, 425 U.S. 820, 829, 833 (1976).²

² These decisions are soundly based on the legislative history of Title VII. In 1964, Congress rejected an amendment proposed by Senator Tower that would have made Title VII the exclusive federal remedy for employment discrimination. 110 Cong. Rec. 13650-52 (1964). When Title VII was extended to cover state and local employees in 1972,

Respondent attempts to distinguish Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984), Ramsay v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985), and Block v. R. H. Macy Co., 712 F.2d 1241 (8th Cir. 1983), on the ground that in each of these cases the claim of racial harassment was joined with a claim

both the House and the Senate Reports reaffirmed the continued viability of Section 1981 as an independent remedy for all types of employment discrimination. The House Report stated:

[T]he Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1970 ..., 42 U.S.C. § 1981, ... is in no way affected. ... Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination.

H.R. Rep. No. 238, 92d Cong., 1st Sess. 18-19 (1971). The Senate Report similarly provided that Title VII was not "meant to affect existing rights granted under other laws." S. Rep. No. 415, 92d Cong., 1st Sess. 24 (1971).

of discriminatory firing, layoff or failure to promote. Respondent's theory is similar to the Fourth Circuit's ruling below that Section 1981 covers only "hiring, firing and promotion," because these matters "go to the very existence and nature of the employment contract." While the Fourth Circuit ruled that Section 1981 never covers other terms and conditions of employment, respondent suggests that claims of racial harassment are covered only if they are joined with a hiring, firing or promotion claim.

Respondent's novel joinder theory does not eliminate the conflict between the Fourth Circuit's ruling and the decisions of other courts of appeals. First, even accepting arguendo the joinder theory, a conflict still exists between the Fourth Circuit's absolute exclusion of racial harassment claims and

the partial coverage of such claims under respondent's interpretation of the other decisions.

Second, the decisions that have upheld Section 1981's coverage of racial harassment make clear that these holdings are not contingent on joinder with another type of claim. Contrary to respondent's assertion, see Brief for Respondent, at 8, Carter v. Duncan-Huggins did not involve the issues of hiring, firing and promotion. See 727 F.2d 1228-30.³ Although respondent claims that "the issues presented to the jury are not set forth in the Opinion" in Carter, the opinion makes very clear what

³ Carter v. Duncan-Huggins also did not involve a parallel Title VII claim. The employer was too small to be covered by Title VII, so the plaintiffs' only cause of action was under 42 U.S.C. § 1981. 727 F.2d at 1228. Thus, neither of respondent's alleged factual distinctions exists with respect to the Carter decision.

those issues were. The court upheld the jury's verdict on the ground that the evidence supported the conclusion that plaintiff "consistently suffered conduct and conditions that were worse than those imposed upon her fellow white employees." 727 F.2d at 1233. The award for "humiliation and other emotional harm" was based on a "'disrespectful' racial anecdote" and the taunting of plaintiff by a fellow employee. Id. at 1238.

Although the claim of racial harassment in Ranney v. American Air Filter Co., was joined with other claims of discrimination, including improper layoff procedures, it is clear that both the district court and the court of appeals viewed the racial harassment as a separate and independent cause of action. The instruction to the jury set forth three separate claims: "the claims of

racial harassment and/or denial of equal opportunities for change in his job classification and/or improper layoff procedures." 772 F.2d at 1312 (emphasis added). The jury was told that plaintiff "has the burden of proving separately as to each claim" the elements of a prima facie case. *Id.* Under respondent's alleged distinction, the jury would have been instructed that it could not find for plaintiff on the harassment claim unless it first found for plaintiff on the layoff claim. *See* Brief for Respondent, at 8. No such instruction was given. Instead, the jury was told that it could find for plaintiff on the harassment claim "and/or" the layoff claim. 772 F.2d at 1312. The court of appeals in *Ramsey* specifically upheld the jury instruction. *Id.* at 1312-13.

Similarly, in Block v. R. H. Macy &

Co., 712 F.2d 1241 (8th Cir. 1983), the award of punitive damages under Section 1981 was upheld as supported in part by evidence of a supervisor's use of a racial epithet. The use of a racial epithet occurred as a separate incident, prior to plaintiff's discharge. 712 F.2d at 1247. There is no hint in the *Block* opinion that Section 1981's coverage of this incident of racial harassment was contingent on joinder with a claim concerning plaintiff's subsequent discharge.

Respondent also attempts to distinguish Wilmington v. J. I. Case Co., 793 F.2d 909 (8th Cir. 1986), on the ground that "the opinion of the Court does not specifically indicate that a separate issue of racial harassment was submitted to the jury under Section 1981." In fact, the opinion in

Wilmington does indicate that this issue was separately submitted to the jury. The court of appeals noted that the jury returned a "special verdict" that "Wilmington was the victim of intentional discrimination in the terms and conditions of his employment." 793 F.2d at 916. The Eighth Circuit treated this claim as separate and independent from plaintiff's discharge claim. Id. at 915-16.

Respondent provides no legal theory or analysis to support the novel joinder rule that it suggests limits the holdings of four courts of appeals. Apparently, respondent's legal argument is that Section 1981 provides a remedy for conduct that does not constitute a violation of Section 1981, but only if the request for the Section 1981 remedy is joined to a separate violation of

Section 1981. Respondent states that if the jury had found in favor of petitioner on her layoff and promotion claims, "then the jury could have properly awarded (if the facts supported) damages for racial harassment." Brief for Respondent, at 8. Under respondent's theory, if an employer subjects an employee to racial harassment and also fires her for a discriminatory reason, the employee can recover for both the harassment and the discharge. If, however, the employer simply harasses the employee so that the terms and conditions of her employment are substantially more oppressive than those of her white co-workers, she can recover nothing under Section 1981. Petitioner is aware of no precedent in any area of law for the proposition that liability for one violation of a statute is dependent on proof of a second violation. Petitioner

submits that such a bizarre and novel limitation on their rulings cannot reasonably be attributed to these four courts of appeals.

II.

THE JURY INSTRUCTIONS

Respondent misapprehends petitioner's claim with regard to the jury instructions. Since a jury issues no findings of fact, it is impossible to know what facts it did or did not believe to be true in the absence of correct instructions. Thus, respondent's discussion of what it believes the facts to be is simply beside the point.

It is clear that evidence was presented to the jury from which it could have found, if properly instructed, that petitioner was not considered for a promotion free of racial discrimination. Thus, the district court, contrary to

respondent's position, noted that petitioner "offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race." And the evidence of racial harassment, racial epithets, and different treatment all supported the claim that the real reason for the failure to promote was race.

Thus, the instructions that required the jury to find proof of superior qualifications in order to hold for petitioner nullified this evidence. It is the fact of this instruction, and not what the jury might have found if properly instructed, that is at issue here.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOV 16 1987

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ROSENDA PATTERSON,

Petitioner,

vs.

MELBA'S CREDIT UNION,

Respondent.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 17, 1987

CERTIORARI GRANTED OCTOBER 3, 1987

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IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-84-73-WS

BRENDA PATTERSON,

Plaintiff,

vs.

MCLEAN CREDIT UNION,

Defendant.

RELEVANT DOCKET ENTRIES

| | | |
|----------|-----|--|
| 1-25-84 | 1. | COMPLAINT - with JURY DEMAND. |
| 2-17-84 | 3. | ANSWER - of defendant. |
| 11-6-84 | 6. | DEFT'S MOTION FOR SUMMARY JUDGMENT |
| 11-6-84 | 7. | DEFT'S BRIEF - in support of Motion for Summary Judgment. |
| 12-14-84 | 11. | PTF'S BRIEF - in response to deft's motion for summary judgment, with attachments. |
| 12-14-84 | 12. | AFFIDAVIT - Brenda Patterson, in support of |

ptf's brief.

3-14-85 13. MEMORANDUM OPINION & ORDER
- of Judge Ward, that
deft's motion for summary
judgment is GRANTED as to
third cause of action of
plaintiff's complaint but
in all other respects
DENIED.

10-22-85 17. PTF'S TRIAL BRIEF.

10-22-85 18. PTF'S PROPOSED JURY
INSTRUCTIONS.

10-23-85 19. DEFT'S TRIAL BRIEF.

10-23-85 20. DEFT'S REQUEST FOR
INSTRUCTIONS.

11-12-85 JURY TRIAL (1st day) held
before Jd. Ward in W-S.
Betty Julian, Court
Reporter.

11-12-85 21. PTF'S REQUESTED VOIR DIRE
QUESTIONS-

11-12-85 22. JURY STIPULATION - approved
by Jd. Ward.

11-12-85 23. PTF'S PROPOSED VOIR DIRE -

11-12-85 24. DEFT'S PROPOSED VOIR DIRE-

11-12-85 25. PTF'S SUPPLEMENTAL TRIAL
BRIEF -
(see witness and exhibit
list)

11-13-85 JURY TRIAL (2nd day)

continued before Jd. Ward
in W-S

11-14-85 JURY TRIAL (3rd day)
continued before Jd. Ward
in W-S.
ORAL MOTION - of deft. for
directed verdict at close
of ptf's evidence. The
Court will allow ptf's
claims of discrimination
re: promotion and of lay
off & subsequent discharge
to go forward and other
claims are dismissed or
merged.

11-15-85 JURY TRIAL (4th day)
continued before Jd. Ward
in W-S.
ORAL MOTION - renewed by
ptf. at close of all
evidence-for direct ver-
dict, denied.

11-18-85 JURY TRIAL (5th day)
continued before Jd. Ward
in W-S.

26. DEFT'S SUPPLEMENTAL TRIAL
BRIEF-

27. JURY VERDICT - that ptf.
did not discriminate
against the ptf. because of
her race in violation of 42
USC § 1981 by denying ptf.
a promotion received by
Susan Howard Williamson or
by laying off ptf. 7-19-82
& subsequently discharging
ptf.

ORAL MOTION - of deft. for atty. fees made. The Court will consider and enter a judgment.

- 11-20-85 28. JUDGMENT - of Judge Ward; that Pltf. have & recover nothing on her claims against deft. & action is DISMISSED.
- 11-20-85 29. ORDER - of Judge Ward; that deft's motion for attys' fees is DENIED.
- 2-16-85 30. PTF'S NOTICE OF APPEAL - to the Fourth Circuit Court of Appeals from the judgment of 11-18-85.
- 3-24-86 32a. TRANSCRIPT - of Trial
-e. 11-12-85 thru 11-18-85 before Judge Ward in Winston - Salem, N.C. filed by Court Reporter Betty P. Julian, in 5 volumes. (in separate expandable folders)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

COMPLAINT

JURISDICTION AND VENUE

1.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(4), 42 U.S.C. Section 1981, and pendent jurisdiction.

2.

The unlawful employment practices alleged below were and are being committed within the State of North Carolina and venue is asserted to be proper in this Court pursuant to 28 U.S.C. Section 1391.

PARTIES

3.

The plaintiff, Brenda Patterson is a black citizen of the United States and is

a resident of Winston-Salem, North Carolina. The plaintiff was employed by the defendant, McLean Credit Union, from May 5, 1972 until July 19, 1982.

4.

The defendant, McLean Credit Union, is and was at all times hereinafter mentioned, a credit union duly organized and existing under the laws of the State of North Carolina. That the defendant maintains a place of business within the City of Winston-Salem, State of North Carolina, and has done so during all relevant times herein.

FIRST CAUSE OF ACTION

5.

The plaintiff, Brenda Patterson, alleges a violation of 42 U.S.C. Section 1981, and offers the following facts to support that charge:

A. The plaintiff was employed by

the defendant, McLean Credit Union, on May 5, 1972. That she was employed at said Company until July 19, 1982.

B. That throughout this time period, plaintiff was an able, capable, and efficient employee of the defendant.

C. That from the time that the plaintiff was employed at the defendant until her termination, she was constantly harassed and was a victim of racial slurs by Robert Stevenson, who was the manager of the defendant. That all times alleged herein, Robert Stevenson was an agent and employee of the defendant and was acting within the course and scope of his employment. That the harassment against the plaintiff by Robert Stevenson also took the form of assigning her an excessive amount of work in an effort to force her to resign from her job.

D. That from the date of her hire

until her termination, the plaintiff was assigned to a clerical job inspite of the fact that she was a college graduate. That white college graduates were not placed in such clerical jobs. That during her employment, vacancies occurred in higher level jobs for which the plaintiff was qualified, but less qualified whites were placed in said positions.

E. That during the one year period immediately prior to her termination, the plaintiff was denied merit increases. That the denial of said merit increases was a part of the racial harassment against the plaintiff by the defendant and was based on race.

F. That on July 19, 1982, the plaintiff was laid off from her employment at the defendant, which subsequently resulted in her termination. That white employees with less seniority and with

less qualifications were not laid off. That the decision to lay off the plaintiff from her employment was made by Robert Stevenson, who was racially biased.

G. That the plaintiff alleges that the above-mentioned facts constitute racial discrimination in job assignment, harassment, wages, and in lay off and termination, and are a violation of 42 U.S.C. Section 1981. That the discrimination against the plaintiff has been continuing from the date she was hired until her lay off and termination.

6.

That as a result of the above-mentioned acts of the defendant, the plaintiff suffered mental anguish and mental and emotional distress, for which plaintiff is entitled to receive special damages.

7.

That the facts alleged in Paragraph 5 constitutes actions by the defendant, which were wilful, wanton, intentional, malicious and in total disregard of the rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

8.

Plaintiff is entitled to recover reasonable attorneys fees for the services of ~~any~~ attorney in these proceedings as provided for in the 1976 Civil Rights Attorneys Fees Awards Act and 42 U.S.C. Section 1981.

SECOND CAUSE OF ACTION

9.

That the plaintiff realleges the facts of Paragraph 5, and incorporates

them by reference herein.

10.

That the above-mentioned acts were intentionally perpetrated against the plaintiff which resulted in the plaintiff suffering mental and emotional distress. That such acts by the defendant constitute intentional infliction of mental and emotional distress.

11.

That the facts alleged above constitute actions by the defendant which were wilful, wanton, intentional, malicious and in total disregard of the rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

THIRD CAUSE OF ACTION

12.

That the plaintiff realleges the

facts of Paragraph 5, and incorporates them by reference herein.

13.

That subsequent to the hiring of the plaintiff by the defendant, Robert Stevenson began to harass the plaintiff by using racial slurs against her, by giving her an excessive amount of work in an effort to force her to resign, and by generally attempting to intimidate her. That Robert Stevenson was racially prejudiced against black employees, and the defendant knew or should have known of his racial prejudice. That employees complained to the defendant about the racial prejudice of Robert Stevenson, and the defendant failed to take any corrective measures. That prior to the time that the plaintiff was terminated from her employment, the defendant knew of the racially prejudiced attitude of Robert

Stevenson against blacks.

14.

That the defendant was careless and negligent in retaining Robert Stevenson as an employee and as a manager of black employees, when the defendant knew or should have known of his racial prejudice against blacks, including the plaintiff.

15.

That as a direct and proximate result of the defendant's negligence in retaining Robert Stevenson as an employee and as a manager of black employees, the plaintiff suffered severe mental and emotional distress, and humiliation, and was also terminated from her employment.

16.

That the facts alleged above constitute negligence by the defendant which was gross, wilful, wanton and intentional and in total disregard of the

rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

WHEREFORE, the plaintiff, Brenda Patterson, respectfully prays this Court:

1. In the first cause of action, to order the defendant to make whole the plaintiff for the 42 U.S.C. Section 1981 violations by granting her compensatory damages, including back pay, front pay, lost pension, insurance, profit-sharing, vacation pay, severance pay, and other employee benefits of at least \$100,000 and 250,000 in punitive damages.

2. To order the defendant to make whole the plaintiff for mental distress imposed on her and as a result of the aforementioned unlawful acts for damages in the amount of at least \$150,000.

3. To order the defendant to

reinstate the plaintiff to the position she would have held absent discrimination.

4. To order the defendant from discriminating against the plaintiff and other blacks in the terms and conditions of their employment in the future.

5. In the second cause of action, that the plaintiff recover judgment against the defendant for intentional infliction of mental and emotional distress in the sum of \$250,000 actual damages and \$250,000 in punitive damages.

6. In the third cause of action, that the plaintiff recover judgment against the defendant for negligent retention of an employee in the sum of \$250,000 actual damages and \$250,000 in punitive damages.

7. To grant plaintiff her attorneys' fees, costs and disbursements.

8. To grant such additional relief

as the Court deems just and proper.

9. Plaintiff demands a trial by jury.

This the 25th day of January, 1984.

/s/ Harvey L. Kennedy
Harvey L. Kennedy

/s/ Harold L. Kennedy, III
Harold L. Kennedy, III.
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IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

A N S W E R

The defendant, McLean Credit Union, answering the Complaint, alleges and says:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against the defendant upon which relief may be granted.

SECOND DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations.

THIRD DEFENSE

The action by the defendant, resulting in the lay-off and termination of employment of the plaintiff, was for good and lawful business reasons having no consideration or regard to race.

FOURTH DEFENSE

Plaintiff exhausted her administrative remedies under Title VII of the Civil Rights Act of 1964. On June 30, 1983, the EEOC issued to the plaintiff a "NOTICE OF RIGHT TO SUE." Plaintiff received said Notice on or about July 5, 1983. Plaintiff failed to institute any civil action against the defendant within ninety days of her receipt of said Notice as required by Title VII.

FIFTH DEFENSE

This action is frivolous, unreasonable and without foundation, and is known by the plaintiff to be such. Accordingly, the defendant is entitled to recover its attorneys' fees incurred in the defense of this action as permitted by 42 U.S.C. Section 1988.

SIXTH DEFENSE

Answering the specific allegations of

the Complaint, the defendant alleges and says:

1.

The existence of the statutes cited in Paragraph 1 of the Complaint is admitted. The remaining allegations in Paragraph 1 of the Complaint are denied.

2.

The existence of the statutes cited in Paragraph 2 of the Complaint is admitted. The remaining allegations in Paragraph 1 of the Complaint are denied.

3.

The allegations of Paragraph 3 are admitted.

4.

The allegations of Paragraph 4 are admitted.

5.

It is denied that the defendant violated 42 U.S.C. Section 1981. The

defendant answers the remaining portions of paragraph 5 as follows:

A. The allegations of Paragraph 5A are admitted.

B. The allegations of Paragraph 5B are denied.

C. It is admitted that Robert Stevenson was the manager of the defendant. The remaining allegations in Paragraph 5C are denied.

D. It is admitted that the plaintiff was assigned to clerical jobs at various times during her term of employment with the defendant. The remaining allegations in Paragraph 5D are denied.

E. It is admitted that during the one-year period immediately prior to the plaintiff's termination that the plaintiff did not receive a merit increase. The remaining allegations of paragraph 5E are

denied.

F. It is admitted that on July 19, 1982 the plaintiff was laid off from her employment with the defendant, said lay-off subsequently resulting in her termination. The remaining allegations of Paragraph 5F are denied.

G. The allegations of Paragraph 5G are denied.

6.

The allegations of Paragraph 6 are denied.

7.

The allegations of Paragraph 7 are denied.

8.

The allegations of Paragraph 8 are denied.

9.

The defendant realleges its answer referred to in paragraph 5 above.

10.

The allegations of Paragraph 10 are denied.

11.

The allegations of Paragraph 11 are denied.

12.

The defendant realleges its answer referred to in Paragraph 5 above.

13.

The allegations of Paragraph 13 are denied.

14.

The allegations of Paragraph 14 are denied.

15.

It is admitted that the plaintiff was terminated from her employment with the defendant. The remaining allegations in paragraph 15 are denied.

16.

The allegations of Paragraph 16 are denied.

WHEREFORE, the defendant, having fully answered the Complaint, prays:

(1) That the plaintiff's action be dismissed and that she recover nothing of the defendant;

(2) That the defendant recover from the plaintiff its reasonable attorneys' fees incurred in the defense of this action for the reason that the plaintiff's action is frivolous, groundless, without foundation and brought in bad faith; and

(3) That the defendant recover its costs.

This the 16th day of February, 1964.

/s/ George E. Doughton Jr.
GEORGE E. DOUGHTON, JR.
Attorney for Defendants

/s/ Kent L. Hamrick

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IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

TRANSCRIPT²/ OF COURT'S CHARGE TO THE JURY
AND COUNSEL'S OBJECTIONS

[P. 5-3] THE COURT: Ladies and gentlemen,
now that you have heard the evidence and
argument of counsel, it becomes my duty
[P. 5-4] to give you the instructions of
the Court as to the law applicable to this
case.

It is your duty as jurors to follow
the law as stated in the instructions of
the Court, and to apply the rules of law
so given to the facts as you find them
from the evidence in this case.

You are not to single out one
instruction alone as stating all of the

²Page references are to Volume V of
the trial transcript, November 18, 1985.

law, but you must consider these instructions as a whole.

Neither are you to be concerned about the wisdom of any rule of law as stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all of the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff and the answer thereto of the [p. 5-5] defendant. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law stated in the instructions of the Court, and arrive at a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair

trial at your hands as a private individual. The law is no respecter of persons: all persons, including corporations, municipalities, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden of proof is on the plaintiff in a civil action such as this, to prove every essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, then the jury should find for the defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. [p. 3-4] In other words, a preponderance

of the evidence in the case means such evidence as, when compared and considered with that which opposes it, has more convincing force, and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any issue or fact has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Now, although the burden is on the party who asserts the affirmative of an issue to prove his or her claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom

possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after considering all of the evidence in the case, the jurors feel that what is sought to be proved on that issue is more likely true than not true. On the other hand, if the jurors do not believe that what is sought to be proved on that issue is more likely true than not true or cannot determine where the truth lies, the issue must be answered against the party who has the burden of proof.

[p. 3-7] There are, generally speaking, two types of evidence from which a jury may properly find the truth from the facts in the case. One is direct evidence -- such as the testimony of an eyewitness. The other is circumstantial evidence -- the proof of a chain of

circumstances pointing to the existence or non-existence of a certain fact.

As a general rule, the law makes absolutely no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence,

regardless of who may have produced them; and all facts which have been admitted or stipulated; and all applicable presumptions contained in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, [p. 3-8] must be entirely disregarded by you.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence in the case, and must be entirely disregarded by you.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as a witness

testifies. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of human experience.

I am sending the exhibits which have been received in evidence with you as you retire to deliberate your verdict.

You are entitled to see any and all of these exhibits as you consider your verdict.

You have heard evidence about events which occurred prior to January 25, 1981. I instruct you that you may not find the defendant liable for events occurring before January 25, 1981. That is, the plaintiff may not recover for any acts before that date. However, the evidence was offered as background evidence and may be considered by you if you find it to be relevant to the plaintiff's allegations

that she was denied a promotion received by Susan Howard Williamson because of her race, or that she was laid off on July 19, 1982 and subsequently discharged because of her race.

[p. 8-9] Now, the plaintiff has testified regarding her competence to perform her employment with defendant at a level which would meet the defendant's legitimate expectations. An employee may testify about the jobs and tasks she performed for her employer. However, the employee's perception or evaluation of the quality of her work or the legitimacy of her abilities and history as an employee is not relevant. When an evaluation of an employee's work performance and capabilities is a factor in a decision to retain her, transfer her to new responsibilities, or to discharge the employee, it is the perception of the

decision maker -- the employer -- which is relevant.

The plaintiff alleges her claim under Title 42 of the United States Code, Section 1981. That statute provides in part that all persons of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens.

This statute guarantees all persons who are employees the same right to equal opportunity in employment. The rights of whites as well as blacks are protected under this law. This means that decisions made by employers must be free from racial prejudice and discrimination, and that white employees and black employees must enjoy the same rights in the employee--employer relationship. An employee has the right to be free from employment decisions which are based on his or her

race.

[p. 5-10] Now, upon all the pleadings and all the evidence in the case, which consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, there arise certain questions or issues which you, as jurors, are called upon to answer. These issues are as follows:

1. Did the defendant unlawfully discriminate against the plaintiff because of her race, in violation of Title 42 of the United States Code, Section 1981: (a) by denying plaintiff a promotion received by Susan Howard Williamson, and (b) by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

2. If defendant did unlawfully discriminate against plaintiff, what amount of compensatory damages, if any, is

plaintiff entitled to recover: (a) for defendant's denying plaintiff the promotion received by Susan Howard Williamson, and (b) for defendant's laying off plaintiff on July 19, 1982 and subsequently discharging the plaintiff?

3. If plaintiff was discriminated against in her employment because of her race, and the defendant's actions in so doing were malicious, wanton, or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from the defendant?

I will now discuss the issues in the same order that they appeared on the form that I just read to you. The first [p. 5-11] issue, again, reads: Did defendant unlawfully discriminate against plaintiff because of her race, in violation of Title 42, United States Code, Section 1981: (a) by denying plaintiff the promotion

received by Susan Howard Williamson, and (b) by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

The first issue has been divided into two parts, both parts corresponding to an alleged discriminatory employment action by the defendant. Plaintiff has the burden of proof on the first issue. Thus, for plaintiff to establish the affirmative for a part of issue one, she must show by a preponderance of the evidence that defendant committed the discriminatory employment action alleged in that part.

The following instructions apply to both parts of the first issue. For plaintiff to establish that an employment action was unlawful discrimination, the plaintiff must show that the employment action was taken by the defendant because of plaintiff's race. In order to

establish that an employment action was taken by defendant because of plaintiff's race, plaintiff must prove that race was a determining factor in the action. A determining factor is a substantial or motivating reason for the action. There may be more than one reason or factor in a decision to take an employment action, and plaintiff does not have to prove that race was the only reason for the employment action. However, race [p. 5-12] must have been a determining factor. Race is not a determining factor if plaintiff has merely proven that race was a factor that affected the decision to take an employment action. Rather, plaintiff must prove that "but for" defendant's motive to discriminate against her because of her race, defendant would not have taken the employment action. In other words, plaintiff's race must have made a

difference in defendant's decision to take the alleged discriminatory employment action.

I will now discuss or address each part of issue one separately. You will first consider Issue 1(a). Part (a) of Issue 1 relates to plaintiff's contention that the defendant denied plaintiff a promotion because of her race. In order to carry her burden on Issue 1(a), the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; and (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan

Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.

With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained [p. 5-13] for the job of accountant intermediate because of her race and was thus denied the promotion because of her race. Plaintiff offered evidence tending to show that defendant's stated reasons for not promoting plaintiff were not its real reasons but a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that it did not deny plaintiff the promotion because of her race. The defendant offered evidence tending to show that Susan Howard Williamson was chosen for the job of accountant intermediate because plaintiff was not qualified for

the job and was less qualified than Susan Howard Williamson. You should consider all the evidence, direct and circumstantial, to determine whether plaintiff was not promoted because of her race or because of the reasons given by the defendant. In making this determination, you should keep in mind that the ultimate factual question for you to answer is whether the plaintiff was the victim of an unfavorable employment decision because of the defendant's intentional discrimination against her because of her race.

For the plaintiff, Mrs. Patterson, to prevail upon this issue, it is necessary that she satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's

intentional discrimination against her because of her race was the real [p. 5-14] reason she did not receive the promotion.

If you find by a preponderance of the evidence that plaintiff was not promoted because of her race, you will answer part (a) of Issue 1 "Yes." If you do not so find, you shall answer part (a) of Issue 1 "No." After you have answered part (a) of Issue 1, proceed to consider part (b) of Issue 1.

1(b) relates to plaintiff's contention that she was laid off on July 19, 1982 and subsequently discharged because of her race. An employer has not violated 42 U.S.C. § 1981 if its decision to lay off or discharge an employee was based on good cause. In fact, an employer may lay off or discharge an employee for poor cause or no cause at all, as long as race is not a determining factor in the

employer's decision. An employer has not violated Title 42 U.S.C., Section 1981 simply because it exercised poor business judgment. It is not the jury's role to second guess the defendant's decision to lay off or discharge plaintiff because you may think the decision lacks wisdom or compassion. However, an employer may not lay off or discharge someone because of race; therefore, the jury is to determine only whether the plaintiff was laid off and discharged because of her race.

Plaintiff offered evidence tending to show that the defendant did not treat race neutrally. Plaintiff offered evidence tending to show that defendant laid off and sub[p.5-15]sequently discharged her because of her race. Plaintiff offered evidence tending to show that the defendant's stated reason for laying off and discharging her, which was based on

business decline, was not its real reason but was a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that plaintiff was laid off because of economic conditions which caused a substantial decline in the defendant's business activities and therefore, business judgment necessitated a reduction in the number of employees. Defendant offered evidence tending to show that the plaintiff was chosen as one to be laid off not because of race, but because of non-discriminatory business reasons. Defendant also offered evidence tending to show that such conditions continued and resulted in plaintiff's final discharge because she had not been recalled within six months after her layoff.

You should consider all the evidence to determine whether defendant laid off

and subsequently discharged the plaintiff because of her race or because of its stated reasons. In making this determination, you should keep in mind that the ultimate factual question for you to answer is whether the plaintiff was the victim of an unfavorable employment decision because of the defendant's intentional discrimination against her because of her race.

For the plaintiff, Mrs. Patterson, to prevail upon [p. 5-16] this issue, it is necessary that she satisfy you by a preponderance of the evidence that the decline in business reasons proffered by the defendant, McLean Credit, were pretextual and that the real reason she was laid off and, after six months without recall, terminated, was because of McLean's intentional discrimination against her because of her race.

If you find by a preponderance of the evidence in the case that defendant laid off and subsequently discharged the plaintiff because of her race, you will answer 1(b) "Yes." If you do not so find, you shall answer 1(b) "No."

Issue 2 is made up of two parts, both of which correspond to a part of Issue 1 with the same letter designation. If you have answered either part of Issue 1 "Yes", you will then proceed to consider Issue 2. However, you will only consider those parts of Issue 2 for which your answer to the corresponding part of Issue 1 was "Yes". In other words, for each part of Issue 1 that you have answered "No", you will not answer that part of Issue 2 with the same letter designation. If you answer both parts of Issue 1 "No", do not consider either part of Issue 2, but end your deliberations and return to

the courtroom.

The second issue reads: If defendant did unlawfully discriminate against the plaintiff, what amount of compensatory damages if any, is plaintiff entitled to recover: (a) for [p. 5-17] defendant's denying plaintiff the promotion given Susan Howard Williamson, and (b) for defendant's laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

The following instructions apply to both parts of Issue 2. The plaintiff has the burden of proving damages by a preponderance of the evidence. The measure of damages in a case for race discrimination in employment is the actual, monetary damage sustained on account of the wrongful acts plus a reasonable amount to compensate for any emotional harm, embarrassment, anxiety or

humiliation proximately caused by the wrongful acts. If you find that plaintiff was discriminated against because of race, you should award her a sum which will put her in a position as if the unlawful discrimination had never occurred. Therefore, this sum should include the difference between the value of the salary and fringe benefits that the plaintiff would have received if no race discrimination had occurred, and the value of the salary and fringe benefits plaintiff has and will actually receive.

An employee may recover for any consequential damages resulting from unlawful discrimination on account of race. In order for these damages to be recoverable, they must have been proximately caused by the defendant's wrongful act, that is, there must be an actual loss which was foreseeable and

which would have naturally arisen from the employer's actions. Thus, if it is established by a preponderance of the [p. 5-18] evidence that an employee incurred expenses or lost benefits or protection such as insurance policies, annuities, or retirement benefits as a proximate result of unlawful race discrimination, the employee may recover damages for expenses incurred and an amount which will reasonably compensate for the value of such lost benefits.

The plaintiff must mitigate her damages, that is, the plaintiff must take reasonable steps to avoid harm to herself from the defendant's act. For example, the plaintiff must make reasonable efforts to find other similar employment. The defendant has the burden of establishing by a preponderance of the evidence that the plaintiff failed to mitigate damages.

If you find that plaintiff failed to mitigate her damages, then any damage award to the plaintiff must be reduced by the value of the damages that plaintiff could have reasonably avoided. If defendant does not establish that plaintiff failed to mitigate damages, the issue of mitigation will have no effect on the damage award.

Another element of compensatory damages is compensation for emotional harm, embarrassment, anxiety, or humiliation. If you should find that the plaintiff was unlawfully discriminated against and as a result she experienced any emotional harm, embarrassment, anxiety or humiliation, you will award her a sum which will compensate her reasonably for any emotional harm, embarrassment, anxiety, or humiliation [p. 5-19] already suffered by her as the proximate result of

defendant's wrongful acts, and for any such emotional harm, embarrassment, anxiety or humiliation which you find from the evidence in the case that she is reasonably certain to suffer in the future from the same cause. However, any amount you award for future injury must be reduced to its present value because a smaller sum received now is equal to a larger sum received in the future.

There is no fixed formula for evaluating such injuries as emotional harm, embarrassment, anxiety or humiliation. You will determine what is fair compensation for such injuries by applying logic and common sense to the evidence.

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award her only such damages as will reasonably compensate her

for such injury and damage as you find, from a preponderance of the evidence in the case, that she has actually sustained as a proximate result of unlawful discrimination.

You are not permitted to presume damages or to award speculative damages. You are not to be governed by the amount of damages suggested by the parties or their attorneys, but you are to be governed exclusively by the evidence in the case and the rules of law that I give you.

The plaintiff has the burden of proving the damages or injuries, if any, which she sustained as a proximate result [p. 5-20] of unlawful conduct by the defendant.

It is the defendant's burden to prove failure to mitigate damages.

If you reach and consider the parts

of Issue 2, you will only award damages, if any, for such injuries as you find by a preponderance of the evidence were proximately caused by the discriminatory act described in that part and alleged by the plaintiff.

Regarding part (a) of Issue 2, you will award damages, if any, caused only by the defendant's failure to promote the plaintiff. Thus, the measure of damages under part (a) include the additional amount of salary and benefits that plaintiff would have received had she been promoted over the course of the rest of her employment with the defendant and continuing for such time after her lay off as you find plaintiff is entitled to damages. Plaintiff is also entitled to emotional damages, if any, caused by her failure to be promoted over the same period of time. Regarding the time period

after plaintiff's lay off, it is important for you to bear in mind that plaintiff will be compensated under Issue 2(b), if at all, for any loss of her regular salary and benefits and emotional injury caused by her lay off and discharge. It is important for you to bear this in mind as the plaintiff is not entitled to a double recovery, that is, the plaintiff may only recover once for a given injury.

[p. 5-21] In conclusion, regarding Issue 2(a), you should determine from a preponderance of the evidence what amount of money, if any, would reasonably compensate the plaintiff for the damage you find was caused by defendant's denying plaintiff the promotion. Enter the amount in the space provided under part (a). However, if you do not find that the plaintiff incurred damages as a result of being denied the promotion, enter "zero"

in the blank. After you have answered Issue 2(a), proceed to consider Issue 2(b).

Regarding part (b) of Issue 2, you will award damages, if any, caused only by plaintiff's being laid off and subsequently discharged. Thus, the measure of damages under (b) includes the difference between the amount of regular salary and benefits that plaintiff would have received had she not been laid off and discharged and the amount of salary and benefits plaintiff actually received starting from the time of her lay off and running for that period of time for which you find the plaintiff is entitled to damages. Plaintiff is also entitled to damages for emotional harm, embarrassment, anxiety, or humiliation, if any, caused by her lay off and discharge over the same time period. If defendant proves that

plaintiff failed to mitigate damages, any award must be reduced by the amount so proven.

In conclusion regarding Issue 2(b), you should determine from a preponderance of the evidence what amount of [p. 5-22] money, if any, would reasonably compensate plaintiff for the damages you find were caused by her lay off and discharge. Enter the amount in the space provided under part (b) of Issue 2. However, if you do not find that the plaintiff incurred damages as a result of being laid off and discharged, enter "zero" in the blank. If you award damages under 2(a) or (b), or both, proceed to consider Issue 3. If your answer to both 2(a) and (b) is "zero", end your deliberations and return to the courtroom with your verdict.

Issue 3 reads as follows: If plaintiff was discriminated against in her

employment because of her race, and the defendant's actions in so doing were malicious, wanton or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from the defendant.

The burden of proof on this issue is on the plaintiff.

If you have awarded the plaintiff either actual or nominal damages, then the law permits you under certain extraordinary circumstances to award the plaintiff punitive damages for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

A jury may, if in the exercise of their discretion they unanimously choose to do so, add to an award of actual or nominal damages such amount as they shall unanimously agree upon to be proper as

punitive or exemplary damages. [p. 5-23]

Punitive damages are awarded only if the jury finds that the defendant maliciously, wantonly or oppressively violated plaintiff's rights.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, spite, or grudge, either toward the injured party individually, or toward all persons in one or more groups or categories of which the injured party is a member.

An act or a failure to act is "wantonly" done, if done with actual knowledge that the action is in violation of rights secured by the laws of the United States, or if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is

"oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity.

If you have found that the plaintiff is entitled to punitive damages from the defendant, enter that amount on the verdict form under Issue 3. If you do not so find, enter "zero" under Issue 3. When you have finished your deliberation on damages, return with your verdict to the courtroom.

Now, ladies and gentlemen, the fact that I have instructed you as to the proper measure of damages should not [p. 5-24] be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should

find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of a witness, or by the manner in which a witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given. You may believe all that a witness says, or you may believe nothing that a witness says. On the other hand, you may believe a part of what a witness says and disbelieve the remainder of what that same witness says.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends

to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of those matters. Consider also any relation [p. 5-25] each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies and discrepancies in the testimony of different witnesses, or in the testimony of a witness, may or may not cause the jury to discredit such testimony. Two or more persons witnessing

an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you think the testimony of that witness is entitled to receive.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present

testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you [p. 5-26] think the testimony of that witness is entitled to receive.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness's testimony in other particulars; and you may reject all of the testimony of that witness, or give it such credibility as you think it deserves.

Evidence that at some other time a witness, not a party to this action, has said or done something, which is inconsistent with the witness's testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of that witness; but may never

be considered as evidence or proof of the truth of any such statement.

Where, however, the witness is a party to the case, and by such statement, or other conduct, admits some fact or facts against his interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is knowingly done, if done voluntarily or intentionally, and not because of mistake or accident or some innocent reason.

Now, if it is peculiarly within the power of either the plaintiff or the defendant to produce a witness who could give material testimony on an issue in the case, failure to [p. 5-27] call that

witness may give rise to an inference that that witness's testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness's testimony would merely be cumulative.

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner whatsoever any intimation as to what verdict I think you should find. What the verdict shall be is the sole duty and exclusive

responsibility of you ladies and gentlemen of the jury.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. In other words, the verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in [p. 5-28] the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or

effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of reaching a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesman here in Court.

A form of a verdict has been prepared for your convenience which bears the caption of the case and includes the issues which I have just read and discussed with you, with a blank space to write in your answer to each of the issues. You will take this form to the jury room and, when you have reached a

unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the verdict form which sets forth the verdict upon which you have unanimously agreed; and then return with the verdict to the courtroom.

* * *

(Jury out)

THE COURT: [p. 5-29] All right, gentlemen, if there are any objections to the Court's instructions to the jury, I'll hear you at this time.

MR. KENNEDY: Your Honor, there is one matter that I would like to call to your attention. At the charge conference in your office on Friday, you had given us how you would charge on the promotion issue. What you charged on today was just a little bit different, and I just wanted to inquire --

THE COURT: Yes. We all agreed, I

believe that we would check further into the law. My check into the law [p. 5-30] revealed, on the promotion issue, it is incumbent upon the plaintiff to show that she was better qualified than the person who actually received it.

MR. KENNEDY: But isn't that in a situation where you've got objective criteria for a particular job and the stated reasons for the promotion, rather than a situation where there are no stated objective criteria for the promotion and it's all so objective. In other words, in a situation where there is no objective criteria for a particular job -- and I think the cases I'm familiar with -- there is a Fifth Circuit case, a Crawford case, there's a case out of the Sixth Circuit against the Ford Motor Company-- indicating that in that situation, where you've got decisions being made on a

subjective basis, that you would not be looking at the standard of more qualified.

THE COURT: Well, I've checked the Fourth Circuit cases and didn't find a 1981 case that addressed the point, but I did find several Title VII cases, and in my opinion, there is no difference between the promotion law, whether it's 1981 or Title VII, and the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received it, and I have so instructed the jury.

MR. KENNEDY: I would like, for the purposes of the record, to make an exception to that point.

[p. 5-31] THE COURT: Yes, sir.

MR. KENNEDY: Also at another point in the charge, you indicated something to the effect that it was the employer's

perception of whether a person is qualified and not the employees' perception. I would except to the way that was --

THE COURT: Well, that's well established law. You can except to it so you can try to change it if you want to, but that is accepted law. Any further complaints? Any objections?

MR. KENNEDY: I think that's all.

MR. DOUGHTON: If Your Honor please, we except to the submission of the third issue on punitive damages to the jury and to the instructions the Court gave on the issue, solely for the purpose of the record.

THE COURT: All right; very well.

* * *

MR. KENNEDY: Your Honor, we have one matter that was called to our attention over lunch time, that there is a recent

Fourth Circuit decision that just came out dealing with the shifting burden of proof. Once the plaintiff introduces evidence of racial animus and racial prejudice, the [p. 5-32] burden of proof then shifts to the defendant. I haven't seen that case--

THE COURT: No, I don't believe you ever will, because that isn't what the Supreme Court says. The burden of proof never shifts. The burden of going forward with the evidence, of course, once that's done, switches over to the defendant to show that there are legitimate non-discriminatory reasons, and then you have to go forward to show that it was pretextual.

MR. KENNEDY: I know there was one recent case I'm familiar with in the Fourth Circuit, where they came out and said that the burden of proof shifts if there is proof that there had been a history of

segregation or if there was proof of a recent history of discrimination. That's the Burlington -- I think, Love vs. Burlington School Board case. In that case, they said the burden of proof shifted. Apparently there has been a recent decision since that one, and I don't know exactly what the name of that decision is. It just came down, but I am familiar with that Burlington case that just said the burden of proof shifts to the defendant --

THE COURT: Well, the burden of proof is always on the plaintiff to show the unfavorable employment decision was as a result of -- well, let me say -- a result of plaintiff's race. I think the jury has been properly instructed on that, as I understand the law, so the burden of persuasion is always [p. 9-33] with the plaintiff. Bring the jury in.

DEC 3 1987

WILLIAM F. SPANGLER, JR.
CLERKIN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

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EDITOR'S NOTE

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WILL BE ISSUED.

QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 encompass
a claim of racial discrimination in the
terms and conditions of employment,
including a claim that petitioner was
harassed because of her race?

2. Did the district court err in
instructing the jury that for petitioner
to prevail on her claim of discrimination
in promotion she must prove that she was
more qualified than the white person who
received the promotion?*

* All parties in this matter are set
forth in the caption.

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No. 87-107

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Brenda Patterson,

Petitioner.

vs.

McLean Credit Union,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 805 F.2d 1143 and is set out in the Appendix to the Petition for Writ of Certiorari (Pet. App.) at pages 1a-20a. The order of the court of

appeals denying rehearing is set out in that Appendix at pages 21a-22a. The oral ruling of the district court granting in part respondent's motion to dismiss is unreported and is set out in the Petition Appendix at pages 23a-25a. The judgment of the district court dismissing the case based on the jury's verdict is set out in the Petition Appendix at pages 26a-28a.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1986. Pet. App. 1a. The court of appeals entered an order denying a timely petition for rehearing en banc on March 19, 1987. Pet. App. 22a. On June 5, 1987, Chief Justice Rehnquist entered an order extending the time for filing a Petition for a Writ of Certiorari to and including July 17, 1987. The Petition for a Writ of Certiorari was filed on July 17, 1987, and was granted on October 5, 1987. The

jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977).

STATEMENT OF THE CASE

This is an action under 42 U.S.C. § 1981, to redress discrimination in employment on the basis of race.

Petitioner, Brenda Patterson, was employed by respondent, McLean Credit Union, from May, 5, 1972, until July 19,

1982. TR¹ 1-20, 1-30. During that time period, McLean Credit Union provided savings and loan services for employees of McLean Trucking Company. TR 3-79 to 3-80, 4-20 to 4-21. McLean employed between eight and ten "general office" employees, including tellers, secretaries and accounting clerks, as well as several other supervisors, managers and professional employees. TR 3-82 to 3-83.

During Patterson's employment, Robert Stevenson served as President and General Manager of the Credit Union. TR 3-79. Stevenson made all of the company's major personnel decisions governing the general office workers, including hiring, firing and salary levels. TR 3-81 to 3-82, 3-123 to 3-124, 4-7.

¹References are to Transcript of Trial, November 12, 13, 14, 15, 18, 1985.

Brenda Patterson was hired by Stevenson as an accounting clerk. TR 2-115 to 2-116. Her primary responsibility was filing, although she occasionally served as a backup teller. TR 1-98 to 1-120. During her pre-employment interview Stevenson informed Patterson "that I was going to be working with all white women ... and that probably they wouldn't like me because they weren't used to working with blacks." TR 1-19. Stevenson himself testified: "I also had no experience working with black people, and from the very beginning I tried to counsel with Brenda." TR 3-97.

Throughout the time she worked at McLean Credit Union, Patterson was subjected to abusive and demeaning terms and conditions of employment. Unlike the other clerical workers, who were white, Patterson was assigned to dust and sweep

the office. TR 1-31. Patterson was constantly scrutinized and criticized in a manner not practiced with respect to the white office workers. Stevenson frequently stood near Patterson's desk, staring at her for several minutes at a time. TR 1-38 to 1-39, 1-90 to 1-91. This close observation, which was not given to white clerical employees, made Patterson nervous and disturbed her concentration on her work. TR 1-38 to 1-39, 2-134 to 2-135.

When white employees made mistakes, they were counselled in private, individual conferences with their supervisor. TR 1-40. However, when Patterson made an error, she was singled out and criticized by name in group staff meetings. TR 1-40 to 1-41, 1-89 to 1-90.

Throughout her employment, Patterson was given an oppressive work load, much in excess of that of her white co-

workers. TR 1-27 to 1-29, 1-81 to 1-83, 1-85 to 1-87. She was required to help white clerical workers with their tasks, but no one was ever assigned to help Patterson. TR 1-37 to 1-38, 1-87, 2-129. Even when her immediate supervisor timed her tasks and determined that Patterson had too much work to do, Stevenson continued to add tasks. TR 1-85 to 1-87, 1-126 to 1-127, 2-126 to 2-128. He then criticized Patterson for her alleged "slowness." When Patterson complained about the amount of work, Stevenson replied: "Well, blacks are known to work slower than whites by nature." TR 1-88.

Company witnesses did not deny this general policy of racial discrimination. In fact, Patterson's supervisor, testifying on behalf of the company, confirmed that Stevenson had stated on numerous occasions that he was not interested in hiring blacks and that the

company's Vice-President and Secretary was aware of Stevenson's attitude. TR 4-89, 4-49. Stevenson's attitudes toward black workers is also revealed in remarks he made to another supervisor. In 1980, this supervisor, Warren Behling, recommended a black candidate for the position of computer operator. After Stevenson had met the applicant, he telephoned Behling to ask: "why the hell didn't you tell me this person was black?" TR 2-161. Behling replied that he did not think that it mattered. *Id.* Stevenson then stated: "Well it does. We don't need any more problems around here." *Id.* Stevenson further commented: "We will interview this person but we will not hire him and we will search for additional people who are not black." *Id.* A less qualified white worker was subsequently hired into the computer

operator position. TR 2-162.²

During the entire period that Patterson worked at McLean Credit Union, all of the supervisors were white. TR 1-29, 3-128 to 3-129. In the thirty-two years that Stevenson worked there, the Company employed only a total of three black workers. TR 3-125 to 3-126, 3-128 to 3-129, 3-195 to 3-196, 4-90. All three of these black workers were given filing jobs. TR 2-115 to 2-116, 3-127. When secretarial or bookkeeping positions opened, white workers were hired or promoted into the positions, while the black workers remained in the file room. TR 4-11 to 4-12.

When she was hired at McLean Credit Union, Patterson told Stevenson that she would accept an entry-level file clerk job, but that she was interested in

²See also TR 1-44 to 1-45 (black job applicant told "he can just forget it").

advancing to bookkeeping or secretarial positions. TR 1-22 to 1-23. Yet, the company did not post job opportunities and Patterson was never able to find out about promotion opportunities until after the decisions had been made. TR 1-45 to 1-46, 1-91 to 1-92, 3-162 to 3-164. Several white workers with less education, less seniority and less experience than Patterson were hired or promoted into secretarial and bookkeeping positions, while Patterson was not. TR 1-92 to 1-94. In each case, the selection of workers to hire and promote was made by Stevenson and the other white supervisors on the basis of their subjective judgments. TR 1-46, 1-92.

In 1974, Susan Williamson, a white woman, was hired into the position of accountant junior, a bookkeeping position. TR 3-105 to 3-106. Patterson, who had been working as an accounting

file clerk for two years, was never given the opportunity to apply for or transfer to the accountant junior position. TR 1-45 to 1-46, 1-91 to 1-92. In 1982, Williamson was promoted into the job of accountant clerk intermediate. TR 3-100, 4-69. Again Patterson had no knowledge of the vacancy and no opportunity to apply. TR 1-46 to 1-47.

Patterson was a college graduate with more formal education and more seniority than Williamson. TR 1-11 to 1-12, 1-21, 1-47 to 1-48. Prior to her promotion, Williamson was given on-the-job training in the duties of the accountant intermediate position. TR 1-48 to 1-49, 3-187 to 3-188. This training was not available to Patterson. Id. One of Williamson's supervisors testified that Williamson did not grasp accounting functions, TR 2-190, and that she was more interested in doing her

crocheting and reading her magazines than in doing her job. TR 2-191. This supervisor testified that the quality of Williamson's work was below average. TR 2-199.

In 1982, during her last year of employment with McLean Credit Union, Patterson was denied a merit increase in her salary that was given to white employees. TR 2-129 to 2-130. Patterson's supervisor testified that this increase was denied because of Patterson's attitude problems. TR 4-46. However, Patterson's annual evaluation, prepared by the same supervisor one month earlier, indicated that Patterson's attitude was above average, and included the comment "Actually Goes Out [of her] Way To Be Pleasant With Everyone." TR 1-63 to 1-64, 4-57 to 4-58, 4-61.

On July 19, 1982, Patterson was laid off and subsequently terminated.

TR 1-50. White employees with less seniority than Patterson were retained. TR 1-57 to 1-58.

District Court Proceedings

Patterson brought this lawsuit against McLean Credit Union on January 25, 1984, in the United States District Court for the Middle District of North Carolina. Patterson alleged that the company was liable under 42 U.S.C. § 1981, for subjecting her to racial harassment and discriminating against her on the basis of her race with respect to promotions and layoffs. JA 7-9. The alleged racial harassment included subjecting plaintiff to racial slurs, assigning her excessive work and denying her a merit increase in her salary. Id. In addition, plaintiff alleged, under pendent jurisdiction, the state tort action of intentional infliction of mental and emotional distress. JA 13.

The case was tried before a jury from November 12 to November 18, 1985. After the presentation of the plaintiff's evidence, the district court ruled that section 1981 does not provide a remedy for racial harassment by the employer. Pet. App. 23a-25a. The court dismissed all of the claims except the claim of discrimination in the promotion of Susan Williamson and in the layoff and subsequent dismissal of Patterson. The court thus dismissed Patterson's claims under section 1981 of racial harassment and salary discrimination, as well as the state law claim of intentional infliction of mental and emotional distress. Pet. App. 24a-25a.³

At the close of all of the evidence, the district court denied the defendant's motion for a direct verdict on the

³The district court's ruling dismissing the state tort claim is not before the Court.

promotion claim. TR 3-46 to 3-51, 3-76. However, the court instructed the jury that to prevail on the promotion claim, plaintiff had to prove that she was more qualified for the position than was Susan Williamson, the white employee who received the job.⁴ The court charged the

⁴The district court instructed the jury on the promotion claim as follows:

In order to carry her burden on [the promotion claim], the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; and (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.

...

With regard to the fourth
(continued...)

jury that, in addition to proving that "McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion," Patterson had to prove that she was better qualified than was Susan Williamson for the position that Williamson ultimately received. JA 42-43.

⁴(...continued)

requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race.

JA 40-41 (emphasis added).

The court later charged:

[I]t is necessary that [plaintiff] satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's intentional discrimination against her because of her race was the real reason that she did not receive the promotion.

JA 42-43 (emphasis added).

The court explained this instruction:

... the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received [the promotion], and I have so instructed the jury.

JA 71. Plaintiffs' counsel specifically objected to this part of the charge. *Id.* The jury returned a verdict in favor of the defendant employer and the district court dismissed the case in its entirety. Pet. App. 26a-28a.

Court of Appeals Proceedings

The United States Court of Appeals for the Fourth Circuit affirmed the district court. The Fourth Circuit held that section 1981 covers racial discrimination only in hiring, firing and promotion, since those matters "go to the very existence and nature of the employment contract." Pet. App. 8a. Characterizing section 1981 as a "more narrow prohibition" than Title VII, the

court ruled that racial harassment relates to the terms and conditions of employment and, therefore, does not abridge the right to make and enforce employment contracts that is conferred by section 1981. Pet. App. 8a-9a.

The Fourth Circuit also held that the jury charge on the promotion claim was proper. The court noted that this case involves a situation in which "an employer had advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant." Pet. App. 19a. Relying on Fourth Circuit precedents,⁵ the court ruled that in this situation, "the burden [is] upon the claimant to prove her superior qualifications." Pet. App. 19a-20a.

⁵Young v. Lehman, 748 F.2d 194, 197-199 (4th Cir. 1984); Anderson v. Besenoff, City, 717 F.2d 149, 154 (4th Cir. 1983), rev'd, 470 U.S. 944 (1985).

A timely petition for rehearing and suggestion for rehearing en banc was denied. Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

I. Racial discrimination in the terms and conditions of employment, including racial harassment and salary discrimination, interferes with the right to make and enforce contracts and discourages the exercise of this protected right. Last Term, the Court reaffirmed that the right to make and enforce contracts "may not be interfered with on racial grounds, Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S.Ct. 2617, 2621 (1987), and that section 1981 forbids all racial discrimination in the making of private as well as public contracts," Saint Francis College v. Al-Khazraji, 481 U.S. ___, 107 S.Ct. 2022, (1987). The Court in Goodman upheld findings that toleration of a pattern of racial

harassment of employees violated section 1981. *Id.* Also last Term the Court held that racial harassment and vandalism of a synagogue violated the owner's rights under 42 U.S.C. § 1982 to purchase and hold property. Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 107 S.Ct. 2019 (1987).

These recent decisions follow a long line of cases interpreting section 1 of the Civil Rights Act of 1866 to prohibit racial discrimination that interferes with, or discourages the exercise of, the right to contract or to purchase and lease property.⁶ For example, in Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431, 437 (1973), the Court held

⁶Jones v. Mayer Co., 392 U.S. 409 (1968); Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431 (1973); Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975); Bunyon v. McCrary, 427 U.S. 160 (1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

that 42 U.S.C. § 1982 prohibits discrimination with respect to the entire "bundle of rights for which an individual pays when buying or leasing" property.

The Court's rulings that section 1981 prohibits "all racial discrimination ... with respect to" the right to make and enforce contracts, Jones v. Mayer Co., 392 U.S. 409, 436 (1968), are firmly grounded in the plain language of section 1981 and the legislative history of the provision. Section 1981 guarantees to black persons the "same" right to make and enforce a contract as is afforded to white persons. The lower court's limitation of section 1981's coverage to hiring, firing and promotion means that the only right that is protected is the right to make a contract on unequal terms.

The legislative history of section 1981 shows that Congress in 1866 was not

primarily interested in protecting blacks from discrimination in hiring, firing and promotion. The former slaveowners in the Reconstruction Era were all too eager to hire and retain black labor. These southern planters devised schemes to continue employing black labor under the same onerous terms and conditions that prevailed prior to emancipation. The Black Codes did not prevent freedmen from entering into contracts. Instead, they imposed detailed, draconian terms and conditions of employment. Congress intentionally drafted a broad and comprehensive provision, directed at a variety of practices, including the harsh treatment of black workers, refusals to pay black workers, conspiracies to fix a maximum wage for black labor, and laws that allowed black employees to be whipped and compelled them to work from "sunrise to sunset." The Fourth

Circuit's limitation of section 1981's scope would exclude from coverage most of the problems that the provision was intended to address.

Section 1981's coverage of discriminatory terms and conditions of employment, such as racial harassment, is important because section 1981 provides remedies not available to plaintiffs under Title VII. Compensatory and punitive damages are particularly appropriate as a remedy for racially discriminatory working conditions. Such violations often are egregious, and yet may not result in a significant backpay award under Title VII. Section 1981's protection from discriminatory terms and conditions of contract also is important in areas such as private education, where many institutions and programs are not covered by any other federal anti-discrimination statute.

Because section 1981 provides a cause of action to remedy discriminatory terms and conditions of employment, plaintiff's claims of racial harassment and salary discrimination were improperly dismissed.

II. A plaintiff may prove that she was denied a promotion on the basis of race without establishing that her qualifications are superior to those of the person selected for the promotion. Even when the employer articulates the selectee's superior qualifications as the reason for its decision, the plaintiff's proof that the employer's reason is pretextual may "take a variety of forms." Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978).

For example, the plaintiff could show that the employer did not actually rely on comparative qualifications by introducing evidence that the employer

was not aware of the candidates' qualifications at the time the decision was made, that the employer did not actually consider the plaintiff for the job or that the employer normally made promotions on the basis of seniority. In addition, the plaintiff could introduce direct or circumstantial evidence from which the factfinder could conclude that the employer had a policy of racial discrimination. The jury instruction in this case, charging that plaintiff had the burden of proving that she was more qualified than the white person who received the promotion, prevented the jury from considering whether the totality of plaintiff's evidence established discriminatory intent.

It follows from the fact that proof of superior qualifications is not necessary for the plaintiff to prevail on the merits that such proof is not

necessary to establish a prima facie case. The Court's precedents make clear that the plaintiff need only show that she met the minimum qualifications for the job in order to meet the "qualifications" element of the prima facie case. Alternatively, the plaintiff can make out a prima facie case through introduction of direct or circumstantial evidence of a policy of racial discrimination.

ARGUMENT

I.

SECTION 1981 PROVIDES A CAUSE OF ACTION FOR RACIAL DISCRIMINATION IN THE TERMS AND CONDITIONS OF EMPLOYMENT

- A. The Court Has Repeatedly Recognized That Section 1981 Prohibits All Racial Discrimination Affecting the Right to Contract

The Fourth Circuit's "narrow" reading of section 1981, to protect against discrimination only in hiring, firing and promotion, is inconsistent with the Court's repeated rulings that

section 1981's scope is broad and comprehensive. Just this past Term, the Court specifically indicated that section 1 of the 1866 Civil Rights Act covers racial discrimination that interferes with the enjoyment of contract rights. In Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S.Ct. 3417 (1987), the Court upheld findings that section 1981 had been violated by, inter alia, toleration by both the employer and the union of racial harassment of black employees. The Court concluded that under section 1981, the right to make and enforce contracts "may not be interfered with on racial grounds." Id. at 3431.⁷ And in Saint

⁷In a dissenting opinion addressing a statute of limitations question, three members of the Court explicitly concluded: "Section 1981 banned racial discrimination in contractual relations, whether individuals were expressly or constructively denied the right to contract because of race, or were provided a lesser opportunity than others, in the form of less favorable (continued...)"

Francis College v. Al-Khasraji, 481 U.S. ___, 107 S.Ct. 2022 (1987), the Court reaffirmed the holding of prior cases that section 1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts." (Emphasis added). Also last Term, the Court construed 42 U.S.C. § 1982, the parallel provision to section 1981 that protects the right to purchase and lease property, to encompass a claim of desecration of a synagogue. Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 107 S.Ct. 2019 (1987).⁸

⁷(...continued)
contract terms or unequal treatment, discouraging entry into contractual relations." Goodman v. Lukens Steel Co., 107 S.Ct. at 2027, n. 4 (1987) (Brennan, J., joined by Marshall & Blackmun, JJ., concurring in part and dissenting in part).

⁸Both § 1981 and § 1982 derive from § 1 of the Civil Rights Act of 1866. In language parallel to that of § 1981, § 1982 guarantees "the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and (continued...)"

Last Term's decisions are the most recent in a consistent line of cases construing section 1 of the Civil Rights Act of 1866. These cases uniformly recognize that section 1 encompasses racial discrimination that discourages exercise of the right to contract or to purchase property. For example, in Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431, 437 (1973), the Court construed section 1982 to prohibit discrimination with respect to the entire "bundle of rights for which an individual pays when buying or leasing" property. In that case, the right to join a neighborhood swimming pool was held to be part of the right to "purchase

⁹(...continued)
convey real and personal property." "In light of the historical interrelationship between § 1981 and § 1982," the Court has in the past "found no reason to construe these sections differently." Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 440 (1973).

... property." even though membership rights in the swimming pool "could neither be leased nor transferred incident to the acquisition of property." *Id.* at 435. The Court reasoned that the right of blacks to purchase homes in the neighborhood was "abridged and diluted" by the recreation association's refusal to provide them the membership opportunities afforded to white property owners. *Id.* at 437.

In both Shaare Tefila and Tillman, the plaintiffs already owned the property at issue. Neither the vandalism of the synagogue nor the denial of the right to join a swimming pool club resulted in an absolute barrier to the plaintiffs' ability to "purchase" or "hold" property. Rather, these deprivations "diluted" the right to purchase property, just as subjecting a black worker to onerous terms and conditions of employment

"dilute[s]" the right to make an employment contract.⁹

In Jones v. Mayer Co., 392 U.S. 409, 423-24 (1968), the Court, in holding that section 1982 reaches private actions, concluded that section 1982 protects property rights against "interference from any source whatever." (Emphasis added). "It is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein" *Id.* at 436 (emphasis added). In Johnson v. Railway

⁹The Court's analysis of section 1982 in Tillman is directly applicable to the coverage of section 1981. In Tillman the Court also ruled that the rights of white pool members to make and enforce a contract under section 1981 were violated by the pool's exclusion of the members' black guests. 410 U.S. at 439-440. Clearly, the ability to bring a black guest is an incidental term of the membership contract, similar to the right to be free from racial harassment.

Express Agency Inc., 421 U.S. 434, 439-40 (1975), the Court confirmed that section 1981 "affords a federal remedy against discrimination in private employment on the basis of race." Significantly, the employment discrimination claims in the Johnson case did not primarily involve hiring, firing¹⁰ or promotion. Rather the issues raised in that case--seniority rules, job assignments and racial segregation¹¹--like those raised by Mrs. Patterson, concerned the terms and conditions of employment.

The broad scope of section 1981's prohibition against all types of discrimination was reiterated in Bunyon v. McCrary, 427 U.S. 160 (1976), and McDonald v. Santa Fe Trail Transportation

¹⁰After the EEOC charge was filed, the plaintiff in Johnson was fired and subsequently amended his charge to allege discriminatory discharge.

¹¹See 421 U.S. at 435.

Co., 427 U.S. 273 (1976). In Bunyon, the Court ruled that section 1981, like section 1982, covers private as well as governmental actions. The Court relied upon the fact that section 1982 guarantees the right of blacks "to purchase property on equal terms with whites." 427 U.S. at 170 (emphasis added). The court concluded that "a Negro's [§ 1981] right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees," *id.* at 170-71. The McDonald decision, holding that section 1981 protects white persons as well as black persons, concluded that "the terms of the bill prohibited any racial discrimination in the making and enforcement of contracts" 427 U.S. at 288.

In Memphis v. Greene, 431 U.S. 100, (1981), the Court reconfirmed that section 1 of the 1866 Act prohibits race-based interference with the enjoyment of protected rights. The Court concluded that section 1982 protects "not merely the enforceability" of property rights, but also the "right to acquire and use property on an equal basis with white persons." *Id.* at 120. The Court noted that actions which "hamper ... the use of ... property" might violate section 1982. Racial harassment and salary discrimination obviously "hamper" the enjoyment of an employment contract. The Court's precedents leave no doubt that discrimination in the terms and conditions of employment, including racial harassment and salary discrimination, are prohibited by section 1981.

Except in the Fourth Circuit, the

lower federal courts have unanimously concluded that discrimination in the terms and conditions of employment is actionable under section 1981.¹² The lower federal courts have also recognized causes of action under section 1982 to remedy conduct that discourages or interferes with the right to purchase and lease property.¹³

¹²Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1421 (7th Cir. 1986); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986); Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1254-57 (6th Cir. 1985), cert. denied, 106 S.Ct. 1197 (1986); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1233 (D.C. Cir. 1984); Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983); Lucero v. Beth Israel Hospital, 479 F. Supp. 452, 453-55 (D. Colo. 1979).

¹³See e.g., McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980) (section 1982 prohibits "subtle racial discrimination [in housing] sales efforts" even where (continued...))

The Court's prior decisions do not distinguish, and there is no basis for a distinction, between explicit and implicit conditions of a contract. Discriminatory conditions to the employment contract, were they known at the outset of the contractual relationship, would surely discourage black individuals from entering into an employment contract and thus deprive them of an equal right to make such contracts. The fact that discriminatory terms and conditions of employment are not stated

13(...continued)

there was no denial of sale); Clark v. Universal Builders, 501 F.2d 324, 330 (7th Cir.), cert. denied, 419 U.S. 1070 (1974)(section 1982 prohibits offering blacks less favorable terms and conditions than those offered to whites); Newbern v. Lake Lorelei, 308 F. Supp. 407, 416 (S.D. Ohio 1968) ("discrimination in the modes of negotiation" violates section 1982). But see Saunders v. General Services Corp., Slip Op., Civ. No. 86-0229-R (E.D. Va. 1987), appeal pending, No. 87-2175 (4th Cir.)(section 1982 covers only outright refusals to sell or lease).

at the outset and are not put into a written document does not lead to a different result. The employer's actions establish that these are implicit conditions of the contract which are different for black employees than for white employees, thus depriving black employees of an equal right to make and enforce an acceptable employment contract. The Court recognized this in both Johnson v. Railway Express, 421 U.S. at 455, and Goodman v. Lukens Steel, 107 S.Ct. 2617, in upholding a cause of action for discriminatory terms and conditions of employment that were not included in any written employment contract.

B. The Plain Language of Section 1981 Prohibits Racial Discrimination in the Terms and Conditions of an Employment Contract

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right

... to make and enforce contracts ... as is enjoyed by white citizens." The plain language of section 1981 makes clear that the statute protects against racial discrimination in the terms and conditions of employment contracts. Under section 1981, persons of all races are guaranteed the "same" right to make and enforce contracts. A contract of employment is merely a combination of many terms and conditions. E.G. Restatement (Second) of Contracts § 3, 224 (1981). A contract for employment either explicitly or implicitly covers at least the fact of employment, the nature of the work, the salary, the working hours, the work rules and penalties for violations thereof, and the location of the job. As the Court noted in Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984):

Because the underlying employment relationship is

contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract.

Under the Fourth Circuit's interpretation of section 1981, some terms of the employment contract, such as the fact of employment and the opportunity for promotion, must be provided on a non-discriminatory basis. However, discrimination in other terms and conditions, such as salary, working conditions, and job duties, is not covered by section 1981. This reasoning converts section 1981's guarantee of the "same" right to make a contract into a guarantee of a "different" right to make a contract.

C. Protection Against Discrimination in the Terms and Conditions of Employment Is Mandated by the Broad Purpose of Section 1981

Section 1981 was first enacted as part of section 1 of the Civil Rights Act

of 1866. In enacting section 1981, Congress intended to prevent and remedy widespread schemes to force black workers to labor under onerous terms and conditions. In fact, Congress' major concern was exactly opposite of that ascribed to section 1981 by the Fourth Circuit. The ability of black workers to obtain or retain employment was not the primary problem. Rather, the problem was to enable black workers to obtain fair terms and conditions of employment.

"Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves," McDonald v. Santa Fe, 427 U.S. at 296. Nonetheless, a major impetus for enactment of section 1981 was the use of both Black Codes and private power to keep newly emancipated blacks in a

condition equivalent to slavery. See Jones v. Mayer, 392 U.S. at 426-429; General Building Contractors v. Pennsylvania, 458 U.S. 375, 386-388 (1982). Thus, Congress' understanding of the problems faced by former slaves in making and enforcing contracts during the reconstruction era is highly probative of Congress' intent with respect to the coverage of section 1981.

The problems at which section 1981 was directed included more than discrimination in the hiring, firing or promotion of black workers.¹⁴ In the reconstruction period, white plantation

¹⁴The primary concern of white landowners was to retain, not to fire or replace, black workers; far from refusing to hire blacks, landowners resorted to a variety of tactics, including threats, violence and patrols, to ensure that blacks stayed in their employ. See, e.g., Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess. 18 (1865) (hereinafter cited as "Schurz Report").

owners continued to need black labor.¹⁵ They simply wanted to maintain the same terms and conditions of employment that existed prior to emancipation.

When it enacted section 1981, Congress had before it massive evidence of efforts by plantation owners to retain former slaves under oppressive terms and conditions. The first detailed account of these new practices and schemes came in a report to the President and Congress by General Carl Schurz. This report played a critical role in the adoption of both the 1866 Act and the Fourteenth Amendment. Jones v. Mayer Co., 392 U.S. at 428. "The report expressed the general view that the South was having difficulty adjusting to the abolition of slavery and that in the absence of

¹⁵See, e.g., H.R. Rep. No. 30, Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., Part II, p.4 (1866) (hereinafter cited as "Reconstruction Committee Report").

federal intervention, a substitute for slavery was not unlikely." Memphis v. Greene, 451 U.S. 100, 131-32, n. 4 (1981) (White, J., concurring). General Schurz observed that the former slaveholders "simply adher[ed], as to the treatment of the laborers, as much as possible to the traditions of the old system, even when the relations between employers and laborers had been fixed by contract."¹⁶ Schurz noted that employers attempted to "introduce into that new system [of contractual employment] the element of physical compulsion." He concluded that "[t]he habit is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible."¹⁷

The former masters were also determined to expend little more for the

¹⁶Schurz Report at 19.

¹⁷Id. at 19-20 (emphasis added).

labor of freedmen than they had for slaves. One Freedmen's Bureau official quoted by Schurz observed:

Nineteen-twentieths of the planters have no disposition to pay the negro well or treat him well ... To defraud, oppress, and maltreat the freedmen seems to be the principle governing the action of more than half of those who make contracts with them.¹⁸

Planters were entirely willing to enter into labor contracts with black workers, but sought to require them to "submi[t] to the will of the employer,"¹⁹ and to permit employers to "arrange the matter of compensation according to their tastes."²⁰

Schurz appended to his report the

¹⁸Id. at 91. The Freedman's Bureau "was especially active" in the field of labor contracts, attempting to obtain "fair" contracts and improved "conditions" for black workers. E.g., J. H. Franklin, *Reconstruction After the Civil War* 37-38 (1961).

¹⁹Schurz Report at 51.

²⁰Id. at 24.

proposal of a group of Louisiana planters regarding the employment of black workers. Schurz described this plan as "true representations of the ideas and sentiments entertained by large numbers today."²¹ The plan did not contemplate racial discrimination in hiring or firing; rather, it called for draconian conditions of employment. Farm laborers were to work a sixty hour week, and "[t]he rate of wages should be fixed--above which no one should be allowed to go."²² Farm workers could neither leave the plantation, nor receive visitors, without written permission of the proprietor. Corporal punishment could be inflicted "to correct any abuse,"²³ and fines or imprisonment would be imposed on any laborers who were not "respectful in

²¹Id. at 22.

²²Id. at 84 (emphasis added).

²³Id.

tone, manner, and language to their employers."²⁴

In the wake of the Schurz report, Congress in early 1866 organized a Joint Committee on Reconstruction to conduct a further investigation. The Joint Committee compiled a detailed record of the circumstances in each of the former rebel states, confirming and elaborating on Schurz's conclusions. Witnesses repeatedly testified that the planters were refusing to pay freedmen a living wage, indeed in some instances refusing to pay them at all,²⁵ and continued to resort to whipping and other acts of cruelty.²⁶

The framers of the 1866 Civil Rights Act were particularly concerned about the

²⁴*Id.* at 85.

²⁵Reconstruction Committee Report, Part II at 17, 52, 54, 56, 61, 83.

²⁶*Id.* at 55, 61, 83.

southern legislation known collectively as the Black Codes, Memphis v. Greene, 451 U.S. at 132 (White, J., concurring); Jones v. Mayer Co., 392 U.S. at 426, 432, 433. But the Black Codes, like the planters, were largely concerned with controlling, directly or indirectly, the terms and conditions under which blacks would be employed, not with preventing blacks from entering into employment contracts. None of the Black Codes prohibited blacks from signing employment contracts, or mandated racial discrimination in hiring, promotions, or dismissals.²⁷

Proponents of the 1866 Act denounced those aspects of the Black Codes which directly controlled the terms and conditions of black employment. In his statement opening the debate on the civil

²⁷See Sen. Exec. Doc. No. 6, 39th Cong., 2d Sess. 170-230 (1867) (Laws in Relation to Freedmen).

rights bill, Senator Wilson denounced provisions of a Georgia statutory proposal that "regulates contracts between master and servant, ... [sets] [w]ork hours, from sunrise to sunset, [makes] [t]he servant ... responsible for damaging the master's property [and allows] [t]he employer [to] discharge servants for ... want of respect."²⁸

²⁸Cong. Globe, 39th Cong., 1st Sess. 39 (1866). Wilson also warned that the Louisiana legislature was considering a bill governing the conditions of employment. Wilson pointed out that under the Louisiana proposal, "[g]eneral conversation will not be allowed during working hours, ... l[eaving] home without permission, will be deemed disobedience," subject to fines, "[n]o live stock will be allowed the laborers without the permission of the employer [and for] all lost time from work hours (unless in case of sickness) the laborers shall be charged twenty-five cents per hour." *Id.*

The Louisiana measure referred to by Senator Wilson, which had in fact been enacted in December 1865, also required farm workers to labor for ten hours a day six days a week, and authorized penalties for "impudence," for "swearing ... to or in the presence of the employer, his family or agent" and for "bad work." S. (continued...)

Finally, Senator Wilson and others objected to the sanctions which a number of southern states imposed on any freedman who attempted to leave his employer in violation of his labor contract. In a number of states, Wilson observed, a laborer's wages were to be withheld until the end of the season, and all of his earned wages were forfeited to the employer if the laborer quit for

²⁸(...continued)
Exec. Doc. No. 6, at 181-182. The South Carolina statute regulating farm labor, objected to by Wilson and members of Congress, see, e.g., Cong. Globe, 39th Cong., 1st Sess. 39 (remarks of Sen. Wilson), 1160 (remarks of Rep. Windom), provided that "the hours of labor, except on Sunday, shall be from sun-rise to sunset," forbade workers to leave the farm or receive visitors without permission of the planter, and authorized corporal punishment for indolence, for being absent "on two or more occasions without permission," or for "want of respect and civility" to the "planter or his family, guests or agents." S. Exec. Doc. No. 6, at 211-212.

another job.²⁹ South Carolina and other states, Representative Windom objected, permitted local authorities forcibly to return to his employer any worker who had not fulfilled his contract.³⁰ The Mississippi law quoted by Senator Wilson provided a bounty to private citizens as well as government officials who summarily returned runaways to their former employers.³¹ Such measures, by penalizing any freedman who attempted to quit his job, forced laborers to tolerate whatever abuses their employers might perpetrate.

Thus, Congress in enacting section 1981 was not primarily concerned about refusals to hire or promote blacks, but rather about leaving blacks "in reality

²⁹Cong. Globe, 39th Cong., 1st Sess. 39 (Georgia and Mississippi).

³⁰Cong. Globe, 39th Cong., 1st Sess. 1160.

³¹*Id.* at 39.

in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition." Cong. Globe, 39th Cong., 1st Sess. 1152 (1866) (Representative Thayer). Congress wanted to assure "not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed." *Id.* The members were concerned that without the protection of the civil rights bill, withdrawal of military rule from the South would leave blacks "practically reduce[d] ... to the condition of slavery." *Id.* at 1124 (Rep. Cook).³²

Section 1981 was therefore directed

³²See also *id.* at 504 (Senator Howard) (Congress must not allow blacks to be reduced "to a condition infinitely worse than actual slavery"), 1124 (Rep. Cook) ("it is apparent that under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race"), 1159 (Rep. Windom).

at a variety of practices, including: "white employers who refused to pay their Negro workers";³³ employers who treated black workers with "great harshness and injustice";³⁴ "planters [who] combine[d] together to compel [freedmen] to work for such wages as their former masters may dictate";³⁵ laws "compelling the return of the freedmen to his master under the name of employer, and allowing him to be whipped for insolence";³⁶ and laws setting "[w]ork hours from sunrise to sunset."³⁷ In order to remedy all of these practices, Congress enacted a comprehensive statute that is broad in

³³*Id.* at 95.

³⁴Cong. Globe, 39th Cong., 1st Sess. 1833 (Rep. Lawrence, quoting testimony of Major General Alfred H. Terry, commanding the department of Virginia, taken before the reconstruction committee, March 1866).

³⁵*Id.* at 1160 (Rep. Windom).

³⁶*Id.*

³⁷*Id.* at 39 (Senator Wilson).

scope. Senator Trumbull, the bill's sponsor, described the protection it would afford as "sweeping and efficient." Cong. Globe, 39th Cong. 1st Sess. 43 (1866). The Senator said that with regard to the rights enumerated, "the very object of the bill is to break down all discrimination between black men and white men." *Id.* at 599 (emphasis added). Senator Howard, another supporter, concluded that, as to the rights enumerated, "there is to be hereafter no distinction between the white race and the black race." *Id.* at 504.

In the House, Representative Cook argued that with respect to the basic civil rights, including "the right to make and enforce contracts," Congress must provide that "there ... be no discrimination" on grounds of race or

color, *id.* at 1124.³⁸ Senator Cowan of Pennsylvania, one of the bill's opponents, believed that section 1981 would confer the right to make and enforce contracts "without any qualification and without any restriction whatever," *id.* at 1781. This understanding of the breadth of the

³⁸Representative Windom explained the provision's requirement of "absolute equality" with timely examples:

In other words, it declares that henceforth ... the colored soldier, who has worn the uniform of the Republic and periled his life for its defense, shall have an equal right, nothing more, with the white rebel yet reeking with the blood of our murdered defenders; to make and enforce contracts ... [and that] no discrimination shall be made in favor of traitors, because they are white and have always been petted and pampered by the Government, as against patriots because they are black and have always been held in cruel and degrading bondage.

Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (emphasis added).

provision was not contradicted by the bill's supporters. See Jones v. Mayer Co., 392 U.S. at 435.

Considered in light of this legislative history, the Fourth Circuit's interpretation of section 1981 is plainly mistaken. If, as the court below believed, section 1981 applies only to discrimination in hiring, firing, and promotions, then the law would not have forbidden most of the practices to which the Thirty-ninth Congress objected. In the face of elaborate schemes to reintroduce slavery by means of oppressive terms and conditions of employment, it is inconceivable that Congress intended only to forbid discrimination in hiring, firing and promotion. Southern planters were all too anxious to hire their former slaves and were quite determined to see that those freedmen did not depart for other

jobs. The 1866 Civil Rights Act was adopted to forbid the introduction of a contract based labor system whose terms and conditions were essentially the same as the old slave system.

The line drawn by the Fourth Circuit between "hiring, firing and promotion" on the one hand, and terms and conditions of employment on the other, would permit, in the modern context, the oppression and exploitation of black workers that Congress in enacting section 1981 wanted to prevent. For example, an employer could have two standard employment contracts, one for whites and one for blacks. White applicants could be offered pleasant, dignified treatment, normal workloads and job assignments consistent with their status. On the other hand, black applicants could be offered an employment contract that provided for them to be subjected to

racial slurs and demeaning scrutiny and to be given much harder and more arduous work than white employees. Under the Fourth Circuit's rule, the offering of two different employment contracts on the basis of race would not violate section 1981, even though the different terms and conditions would discourage blacks from "mak[ing]" a contract with this employer. As long as the employer does not apply an absolute prohibition on contracting with blacks, under the Fourth Circuit's ruling it is free to use any means of discouraging or intimidating blacks from entering into a contract.

The Fourth Circuit's ruling also apparently means that wage discrimination is not actionable under section 1981. In the instant case, plaintiff's claim of salary discrimination was dismissed. Thus, an employer that paid black workers less than white workers doing the same

job would not be found liable under section 1981, notwithstanding that wage discrimination was one of Congress' major concerns when it enacted section 1981. See Cong. Globe, 39th Cong., 1st Sess. at 504, 1160, 1833.³⁹

The Fourth Circuit's narrow interpretation would eliminate section 1981's coverage in the areas where its protection and remedies are most needed. Section 1981 provides a "separate, distinct and independent" remedy from

³⁹The exclusion of wage discrimination under the Fourth Circuit's decision illustrates the difficulty of drawing a clear line between those terms of employment that "go to the very existence and nature" of the employment contract and those that do not. To implement the Fourth Circuit's ruling, the federal courts would be faced with the task of determining whether a large variety of employment-related decisions do or do not relate to the "essence" of the contract. The courts will have to decide the status of such matters as transfers (arguably like promotions), training, discipline that does not lead to immediate discharge, harassment that results in constructive discharge and awards of seniority.

Title VII of the Civil Rights Act of 1964. Johnson v. Railway Express Agency, 421 U.S. at 461. Although section 1981 and Title VII of the Civil Rights Act of 1964 both prohibit racial discrimination in employment,⁴⁰ section 1981 covers additional types of discrimination that are not prohibited by any other federal statute and provides valuable rights and procedures that are not available under Title VII.

The Seventh Amendment right to a jury trial applies to claims brought under section 1981,⁴¹ while Title VII

⁴⁰Section 1981 is directed at racial discrimination in all types of contracts, including employment contracts, while Title VII is limited to employment discrimination, but covers such discrimination on the basis of religion, sex and national origin, as well as race and color, see 42 U.S.C. § 2000e-2.

⁴¹In Curtis v. Loether, 415 U.S. 189, 194 (1974), the Court held that the Seventh Amendment applies to an action in federal court to enforce a civil rights statute that creates legal rights and (continued...)

claims are tried to the court. In addition, the remedies available under section 1981 are broader than those authorized by Title VII. Because of these differences in remedy, section 1981's prohibition of discrimination in the terms and conditions of employment, particularly racial harassment, is critically important. Title VII provides only equitable relief, which means that the only monetary remedy available under that statute is lost salary or wages.⁴² Discrimination in the terms and conditions of employment, such as racial harassment, may not give rise to any monetary claim for backpay. In many

⁴¹(...continued)
remedies. The right to a jury trial applies under § 1981 because that section affords plaintiffs both equitable and legal relief, including compensatory and, in some cases, punitive damages. Johnson v. Railway Express, 421 U.S. at 460.

⁴²E.g., Hunter v. Allis-Chalmers, 797 F.2d at 1421.

cases of such discrimination, the only relief available under Title VII will be an injunction that simply reiterates the command of the statute. Often, that relief will not be a sufficient deterrent to harassment.

Section 1981 authorizes compensatory and punitive damages, in addition to backpay and the other types of equitable relief available under Title VII. Johnson v. Railway Express, 421 U.S. at 460. Because racial harassment is often an egregious form of discrimination, compensatory damages for mental suffering and punitive damages are particularly appropriate in many of these cases. The availability of actual and punitive damages can provide an effective deterrent and help to rid the workplace of this persistent form of

discrimination.⁴³

Section 1981's protection against discrimination in the terms and conditions of contracts is vitally important in areas other than employment. Section 1981 provides a cause of action to remedy discrimination in the right to contract for other types of benefits. For example, in Runyon v. McCrary, the Court held that section 1981 prohibits discrimination by private schools. 427 U.S. at 172-173. A ruling that section

⁴³See, e.g., Block v. R. H. Macy & Co., Inc., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) (Title VII and § 1981 claims for discharge and racial harassment; \$20,000 in actual and \$60,000 in punitive damages awarded, of which only \$7,598 was back pay under Title VII); Fisher v. Dillard University, 499 F. Supp. 525, 537 (E.D. La. 1980) (Title VII and § 1981 claims of unequal pay; \$11,127 in backpay, \$50,000 in compensatory damages and \$10,000 in punitive damages awarded). Cf. Webb v. City of Chester, Ill., 813 F.2d 824, 836 (7th Cir. 1987) (§ 1983 sex discrimination claim for discharge; \$20,250 awarded for embarrassment and humiliation; \$9,750 for lost wages).

1981 does not encompass discrimination in the terms and conditions of contracts would mean that many victims of such discrimination would have no remedy. Under the Fourth Circuit's decision, black students could obtain admission to the programs of private educational institutions that receive no federal financial assistance, but the students could then be racially harassed or segregated.

II.

DISCRIMINATORY INTENT CAN BE CONCLUSIVELY ESTABLISHED WITHOUT PROOF OF PLAINTIFF'S SUPERIOR QUALIFICATIONS

The district court and the court of appeals each relied upon a different ground in attempting to justify the "superior qualifications" jury instruction. The district court believed that proof that the plaintiff's qualifications were superior to those of the selectee was necessary for the

plaintiff to establish a prima facie case of discrimination. The court of appeals reasoned that once the employer articulates the selectee's superior qualifications as a defense, the only way that the plaintiff can rebut the employer's assertion and prevail on the ultimate question of discriminatory intent is to prove that her own qualifications are superior.

Both courts below erred by looking at the wrong question. The ultimate issue is not whether plaintiff's qualifications are superior to those of the selectee. The factual question to be decided is whether the employer acted with a discriminatory motive. United States Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Evidence of discriminatory intent "might take a variety of forms." Furnco Construction Corp. v. Waters, 438 U.S.

567, 578 (1978).⁴⁴ Where the employer articulates the selectee's alleged superior qualifications as the reason for its decision, the plaintiff may still prevail without proving that her own qualifications are superior. In that situation, the plaintiff may prevail either by showing that her own qualifications are superior or by convincing the factfinder that the employer did not actually rely on a comparison of the candidates' qualifications in making its decision. The plaintiff's burden is to prove that the employer's reason is pretextual. She may do this in either of two ways:

⁴⁴The method of proof was "never intended to be rigid, mechanized, or ritualistic." Furnco, 438 U.S. at 577. "The facts necessarily will vary in Title VII cases, and the specification ... of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n.13 (1973).

"directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The Fourth Circuit's "superior qualifications" requirement relies on the Court's conclusion in Burdine that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." 450 U.S. at 259.⁴⁵ Yet, this statement from the Burdine opinion demonstrates why the "superior qualifications" rule is erroneous. Admittedly, the mere fact that an employer has chosen a white when there were two equally qualified candidates does not by itself establish

⁴⁵See Pet. App. at 20a.

discrimination. However, the stipulation that "the decision is not based upon unlawful criteria" indicates that the plaintiff must be afforded an opportunity to prove that the decision was in fact based on discrimination.

A. The Fourth Circuit's Ruling Eliminates At Least Four Ways By Which the Plaintiff May Prove Discriminatory Intent Without Establishing Her Superior Qualifications

In this case, the "superior qualifications" instruction prevented the jury from considering whether the totality of plaintiff's evidence established discrimination. A number of methods by which a plaintiff may establish discriminatory intent are well-established in the federal courts. In appropriate circumstances, any single type of evidence may be sufficient to permit the factfinder to make the ultimate finding of discrimination. In reality, the plaintiff will most often

rely on a combination of different types of evidence, each of which sheds light on the defendant's intent from a different perspective. Thus, it is the totality of the evidence that paints a picture of the defendant's state of mind.⁴⁶

1. Overt policy of discrimination.

One type of evidence which may alone support a finding of discriminatory intent is an overt policy of discrimination. In Trans World Airlines v. Thurston, 469 U.S. 111 (1985), the Court unanimously concluded that a written, overt policy of age discrimination was conclusive proof of discriminatory intent. This evidence operated to shift the burden of proof to the defendant to show that the plaintiff

⁴⁶E.g. United States Postal Service v. Aikens, 460 U.S. 711, 714-16 (1983); Pullman-Standard v. Swint, 456 U.S. 273, 279, 281-82, 291 (1982); McDonnell Douglas, 411 U.S. at 804-805.

was not the victim of the policy.⁴⁷ Yet, under the Fourth Circuit's ruling, the plaintiff cannot prevail even if she introduces uncontroverted, direct evidence of the employer's discriminatory intent. An admission by the employer's witness or a written statement of discriminatory intent would not suffice to rebut a mere articulation by the employer that the selectee was more qualified than the plaintiff. This ruling eliminates the overt policy as a method of proving discriminatory intent and is directly contrary to Thurston.⁴⁸

⁴⁷The Court ruled in Thurston that the method of proof established in McDonnell Douglas does not apply in cases where the plaintiff relies on direct evidence. 469 U.S. at 121. See also Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556-1557 (11th Cir. 1983), cert. denied, 104 S.Ct. 2385 (1985).

⁴⁸Plaintiff's counsel specifically argued to the district court that the "superior qualifications" jury instruction is improper where the plaintiff introduces direct evidence of
(continued...)

The plaintiff in this case introduced evidence that the employer had an overt policy of discrimination. The admission by the company's own witness that the defendant's President "didn't want to hire any blacks or women," TR 4-89, is equivalent to the facial evidence of discrimination in Thurston. The jury could reasonably conclude that this admitted policy applied to promotions as well as hiring. The district court should not have instructed the jury that plaintiff had the burden of proving her superior qualifications. Instead, the court should have charged that, if the jury found on the basis of direct evidence that the company had a policy of discrimination in promotions, the burden would shift to the employer to prove that, even in the absence of the

⁴⁸(...continued)
discriminatory intent. JA 72-73.

policy of discrimination, plaintiff would not have received the promotion in question.

2. Inferential proof of a pattern of discrimination.

In Teamsters v. United States, 431 U.S. 324, 335, n.15, 358 n.44 (1977), the Court ruled that the plaintiff may establish a pattern and practice of discrimination through circumstantial evidence. The evidence in that case included statistical analyses of the employer's hiring and assignment decisions, anecdotal evidence of the treatment of individual minority workers and historical evidence of discriminatory practices. Id. at 336-340.

Although Teamsters involved an allegation of a company-wide pattern of discrimination against a class of minority workers, the method of proof used in that case is also applicable to

an individual claim.⁴⁹ Plaintiff in the instant case introduced evidence analogous to that presented in Teamsters. Although the small size of the defendant's work force did not permit a statistical analysis of its promotion practices, Patterson introduced other evidence sufficient to support a finding of a pattern and practice of discrimination. Patterson showed that the company had no black supervisors, accounting employees or secretaries ever. She showed that in its entire history, the company had only three black employees and that they were all file clerks. She introduced evidence

⁴⁹The Court in Thurston, an individual, non-class action case, cited Teamsters to support the conclusion that direct evidence of a policy of discrimination shifts the burden of proof to the employer. 469 U.S. at 121. The Court has also relied on the principles announced in Teamsters in its decisions in other individual, non-class action cases. E.G. Aikens, 460 U.S. at 714, n.3; Burdine, 450 U.S. at 254.

sufficient to support the finding that whites with lesser qualifications were transferred or hired into the secretarial and accounting positions. She showed that when the company finally decided to hire its first black employee some eight years after passage of Title VII, the idea was so traumatic that it required special meetings and counseling.⁵⁰ She also introduced evidence sufficient to support a finding of racial harassment.

When a pattern of discrimination is shown, the only additional evidence necessary to establish an individual claim is that the "alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination."

⁵⁰Stevenson testified that prior to Patterson's employment, he held a staff meeting to explain "that we had not had black employees before, and the white people in the past had not had any experience working with black people." TR 3-96 to 3-97.

431 U.S. at 362. Moreover, an application is not necessary if the employer's discrimination discouraged the worker from applying. *Id.* at 365-66.⁵¹ Clearly, proof of the plaintiff's superior qualifications is not necessary for the plaintiff to make out a prima facie case under this method of proof.

3. Remarks betraying racial prejudice.

Remarks by a key decisionmaker that reflect racial prejudice or racially stereotypical thinking are directly

⁵¹Patterson's proof that she was never able to find out about vacancies in order to apply is sufficient to satisfy this requirement, particularly since she expressed a general interest in promotional opportunities. See JA at 40; *Box v. A & P Tea Co.*, 772 F.2d 1372, 1376, 1377 (7th Cir. 1985), cert. denied, 106 S.Ct. 3311 (1986); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132-34 (11th Cir. 1984); *Oetroff v. Employment Exchange*, 683 F.2d 302, 304 (9th Cir. 1982); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761, 762 (9th Cir. 1980).

probative of the employer's state of mind in making personnel decisions. E.g. *Miles v. MNC Corp.*, 750 F.2d 867, 874 (11th Cir. 1985); *Van Houdnos v. Evans*, 807 F.2d 648, 652-653 (7th Cir. 1986). Such remarks alone can support an inference of discriminatory intent.⁵² For example, in *Miles v. MNC Corp.*, 750 F.2d at 874, the Eleventh Circuit held that a single racial slur, if believed by the factfinder, would be sufficient to establish the existence of a discriminatory motive that would shift the burden of proof to the defendant. In *Miles*, a former employee of the defendant testified that when she asked the hiring official "why they didn't have any blacks," he replied: "Half of them weren't worth a shit." *Id.* at 874. The

⁵²"As in any lawsuit, the plaintiff [in an employment discrimination case] may prove his case by direct or circumstantial evidence." *Aikens*, 460 U.S. at 714, n.3.

court of appeals ruled that the trier of fact should first determine whether it believed this evidence. Id. at 875. If so, the existence of a discriminatory motive would be established. The burden of proof then would shift to the defendant to prove that it would have made the same decision in the absence of the illegal motive. Id. at 875-876.

The facts of the instant case are almost identical to those in Miles v. MNC Corp. Both cases involved a racial slur that directly denigrated the work abilities of blacks. The statement in this case that blacks are "slower by nature" than whites is almost identical to the statement in Miles. In both cases the remark was made by the decisionmaker involved in the decision challenged by the plaintiff. Moreover, the remark in this case is consistent with a number of other statements made by defendant's

President which reflect racial prejudices and policies. By requiring proof of the plaintiff's superior qualifications, the district court erroneously prevented the jury from considering whether this evidence established defendant's discriminatory intent.

4. Proof of pretext.

In McDonnell Douglas v. Green, 411 U.S. 792 (1973), and subsequent cases,⁵³ the Court developed a model of proof of discriminatory intent based on indirect evidence.⁵⁴ The McDonnell Douglas line

⁵³Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Service v. Aikens, 460 U.S. 711 (1983).

⁵⁴Although this method of proof was developed in the context of claims under Title VII, it would seem equally applicable to the identical issue of individual disparate treatment under section 1981. E.g., Ramsey v. American (continued...)

of cases recognizes that direct evidence of discriminatory intent, such as that discussed above, is rarely available. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." Aikens, 460 U.S. at 716. Moreover, these cases make clear that proof of a general, widespread pattern and practice of discrimination under the Teamsters model is not necessary for an individual plaintiff to prevail on a claim related to an adverse action in a specific situation.

The McDonnell Douglas line of cases focuses on the employer's reasons for making specific personnel decisions. Rather than directly seeking to prove the employer's state of mind, this method of proof seeks to eliminate all of the other

⁵⁴(...continued)
Air Filter Co., 772 F.2d at 1307; Carter v. Duncan-Huggins, Ltd., 727 F.2d at 1232.

possible reasons for the employer's decision, leaving discrimination as the only remaining explanation. "[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." Furnco, 438 U.S. at 577.

The model utilizes a three-stage method of proof. The plaintiff first has the burden of establishing a prima facie case. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-53. Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to "produc[e] evidence" that its decision was based on "a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. The defendant's burden is

one of production, not proof. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255. The plaintiff must then be provided a full and fair opportunity to demonstrate that the asserted reason is a pretext for discrimination. "This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Id. at 256.

Logic supports the conclusion that when the plaintiff relies on the McDonnell Douglas approach to prove intent, an absolute requirement that she prove her superior qualifications is improper, even where the employer articulates the selectee's superior qualifications as the purported reason

for its decision. Under the McDonnell Douglas method of proof, plaintiff's burden is to demonstrate that the "proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. The plaintiff may be able to discredit the employer's reason without proving that her qualifications are superior.

At least two factual assertions are inherent in the employer's articulation that the selectee's superior qualifications were the reason for its decision. One factual assertion is that the selectee's qualifications are in fact (or were genuinely perceived to be) superior, rather than equal or inferior to those of the plaintiff. The second assertion is that the employer actually relied on this disparity in qualifications in making its decision.

Obviously, one way to discredit the employer's proffered explanation is to

show that it is untrue because plaintiff is the more qualified candidate. This is not the only way to accomplish this result, however. There are at least three ways through which the plaintiff can meet her burden of discrediting the proffered explanation that do not involve proof of her superior qualifications. First, the plaintiff could convince the factfinder that her qualifications are equal (or were perceived as equal) to those of the selectee. For example, in Hawkins v. Arheuser-Busch, Inc., 697 F.2d 810, 814-15 (1983), the court found the defendant's explanation that the selectee's qualifications were superior to be a pretext, because the plaintiff proved that she was at least as qualified for the position. Thus, under Hawkins, in the appropriate circumstances a showing of equal qualifications would be sufficient to prove the Title VII claim

because it would demonstrate that the decision was made for reasons other than the candidates' relative qualifications.

Second, the plaintiff could convince the factfinder that the employer more likely than not did not rely on qualifications in making its decision. The plaintiff might cast doubt on the employer's reliance on alleged superior qualifications by showing that the employer normally promotes on the basis of seniority. Or, as in Joishi v. Florida State University Health Center, 763 F.2d 1227, 1235 (11th Cir. 1985), the plaintiff could prove that the relative qualifications of the selectee could not be the actual reason for the defendant's refusal to hire plaintiff, since the plaintiff was not actively considered for the position.

Third, the plaintiff might simply convince the factfinder that the asserted

reason is not credible. As the ultimate judge of credibility, the factfinder in making this determination could rely on any number of factors, from direct evidence of discriminatory motive to inconsistencies in the testimony to demeanor and inflection.⁵⁵

The Court in McDonnell Douglas rejected any restriction on the ways in which a plaintiff may prove pretext and thus prevail on the ultimate question of discrimination. The Court in that case suggested a variety of types of evidence

⁵⁵See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) ("variations in demeanor and tone of voice ... bear so heavily on the listener's understanding ... of and belief in what is said"; "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it"). See also Kilgo v. Bowman Transportation, 789 F.2d 859, 875 (11th Cir. 1986) (employer's articulated reason found "unconvincing" because the reason constantly shifted).

that might be offered on the ultimate question of intent. Only one of the types of evidence mentioned by the Court involved a direct comparison between the plaintiff and the selectee with respect to the factor articulated by the employer as the decisive factor.⁵⁶ The Court did not indicate that this type of comparative evidence is required; only that such evidence would be "[e]specially relevant." 411 U.S. at 804. "Other evidence that may be relevant to any showing of pretext includes facts as to

⁵⁶The Court concluded: "Especially relevant to [a showing that the employer's stated reason was a pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired." 411 U.S. at 804. The treatment of persons with comparable misconduct in McDonnell Douglas is analogous to evidence of plaintiff's superior qualifications in a case where the employer articulates the selectee's superior qualifications as the reason for its decision. In each case, the evidence goes to a direct comparison of plaintiff and the selectee on the articulated factor.

the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." McDonnell Douglas, 411 U.S. at 804-805.

The "superior qualifications" instruction prevented the jury in this case from considering whether plaintiff had proved that the employer's articulated reason was not worthy of credence.⁵⁷ Plaintiff introduced

⁵⁷The jury instruction in the instant case had an additional flaw. The court charged the jury that it was required to find both that plaintiff's race was "the real reason that she did not receive the promotion," and that plaintiff was more qualified than the selectee. JA 40-41, 42-43. However, these are alternative ways to prove pretext. E.g., Burdine, 450 U.S. at 256. If the plaintiff discredits the employer's articulated reason, no further proof of intent is required. Id.; Aikens, 460 U.S. at 716; id. at 717-718 (Blackmun, J., joined by Brennan, J., concurring).

substantial evidence to support such a conclusion. In addition to the direct and circumstantial evidence discussed above, Patterson introduced evidence from which the jury could have concluded that her qualifications were at least equal to those of Williamson.⁵⁸ Patterson also introduced evidence that Williamson's qualifications resulted from training that Patterson was denied because of her race. TR 1-48 to 1-49, 3-187 to 3-188.⁵⁹

⁵⁸Patterson had a college degree, while Williamson had taken only a few college courses. TR 1-47 to 1-48. Patterson also had more seniority with the company. Id. One of Williamson's supervisors severely criticized Williamson's job performance and knowledge of accounting functions. TR 1-159, 2-190 to 2-191.

⁵⁹The district court concluded that "plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race." JA 41. However, the court related the allegation of discriminatory training to Patterson's burden of proving that race was the real reason for the selection of
(continued...)

Finally, Patterson introduced evidence suggesting that she was not actually considered for the promotion and that the employer was not fully aware of her qualifications. TR 3-179 to 3-180, 4-27, 60

B. Proof of Superior Qualifications Is Not Necessary To Establish a Prima Facie Case

The district court justified the "superior qualifications" jury instructions on the ground that this element of proof is necessary to establish a prima facie case of

59 (...continued)

Williamson, and did not instruct the jury that a finding in favor of plaintiff on the training allegation would negate the requirement that she prove that her qualifications were superior. *Id.*

⁶⁰See, e.g., Joshi v. Florida State University Health Center, 763 F.2d 1227, 1235 (11th Cir. 1985); Eastland v. Tennessee Valley Authority, 704 F.2d 613, 625-26 (11th Cir.), modified on other grounds, 714 F.2d 1066 (1983), cert. denied, 465 U.S. 1066 (1984); Lowery v. WNC-TV, 658 F. Supp. 1240, 1259, vacated on other grounds, 661 F. Supp. 65 (W.D. Tenn. 1987).

employment discrimination. As discussed above, it is not necessary for plaintiff to establish her superior qualifications to prevail on the ultimate question of discriminatory intent. It follows that the plaintiff cannot be required to meet this burden at the prima facie case stage. Moreover, once the case has gone to the factfinder on the ultimate question of intent, it is not necessary to consider whether the plaintiff had established a prima facie case. Aikens, 460 U.S. at 715-716. Nonetheless, because the jury instruction in this case was based on the district court's understanding of the prima facie case requirements, petitioner will address below the issue of plaintiff's burden at the prima facie case stage.

Requiring the plaintiff to prove her superior qualifications at the prima facie case stage is logically

inconsistent with the theory behind the McDonnell Douglas method of proof. The purpose of the prima facie case is not to ascertain whether the plaintiff has proved her entire case. Rather, the purpose is to determine whether the plaintiff has proved enough to make it fair to ask the employer to assist the plaintiff in further development of the case, by focusing the issue and saving time for everyone.⁶¹ The employer has

⁶¹The McDonnell Douglas tripartite method of proof is designed "to bring the litigants and the court expeditiously and fairly to [the] ultimate question" of discriminatory intent. Burdine, 450 U.S. at 248. The major purpose of the prima facie case in this situation is not to "hel[p] the judge to determine whether the litigants have created an issue of fact to be decided by the [factfinder]." Burdine, 450 U.S. at 254, n.8. Rather, "the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id. The employer's intermediate burden of articulation operates simply to "frame the issue with sufficient clarity." Id. at 255. Given the wide variety of
(continued...)

superior access to information about the actual reasons for its decision, and in many cases only the employer can specify which qualifications it considered important or how it weighed the different factors, such as education and experience, that comprise a candidate's qualifications.

Under the method of proof adopted in McDonnell Douglas and Burdine, the plaintiff bears the burden of discrediting only the reason or reasons articulated by the defendant. Comparative qualifications may not even be one of

⁶¹(...continued)
reasons that might possibly have motivated a particular decision, it makes sense, once the plaintiff has established that she applied, met the minimum qualifications and was rejected for a position, to require the employer to narrow the focus by identifying its purported actual reason.

those reasons.⁶² For example, in McDonnell Douglas, the employer met its burden of articulation by introducing evidence that its decision not to rehire plaintiff was based on plaintiff's prior misconduct. The relative qualifications of plaintiff and the persons who were rehired never became an issue in the case. Yet, if the plaintiff had been required to prove his superior qualifications at the prima facie case stage, the case might have been dismissed before he had "a full and fair opportunity" to introduce evidence on the

⁶²Although it is socially desirable that employers make hiring and promotion decisions on the basis of qualifications, McDonnell Douglas, 411 U.S. at 801, it is common knowledge that other factors, such as prior employment, e.g., Furnco, 438 U.S. at 570, disciplinary record, attendance record, recommendations and seniority, often are influential or determinative in hiring or promotion decisions. Racial discrimination also frequently is the real reason behind employment-related decisions.

factual questions that were actually relevant.

The McDonnell Douglas line of cases indicates that, with respect to qualifications, the plaintiff's initial burden is to establish only that she meets the minimum, nondiscriminatory qualifications for the job at issue. In McDonnell Douglas, the plaintiff's burden at the prima facie stage was to show that he was "qualified." 411 U.S. at 802. The plaintiff met this burden by proving that his past work performance had been "satisfactory." *Id.* The Court did not even consider how the performance and experience of the applicants who were hired compared to that of the plaintiff.

In Burdine, the Court noted that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253. As in McDonnell Douglas, the Court had no

difficulty in concluding that the plaintiff had met this burden by showing that she was "a qualified woman." *Id.* at n. 6. The Court again did not consider whether the plaintiff was ~~more~~ qualified than the selectee. Yet, the court of appeals had ruled that the plaintiff met the qualification requirement of the prima facie case, on the ground that she had been considered for the open position and the selecting official "refused to state that plaintiff was not qualified ... [but] merely asserted that Watts was better qualified." Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 567, n.6 (5th Cir. 1979) (emphasis added). Moreover, the issue directly raised and decided in Burdine was whether, in order to rebut the plaintiff's prima facie case, the defendant bears the burden of proving that the qualifications of the plaintiff

are inferior to those of the selectee. If the Court's finding that plaintiff satisfied the prima facie case requirement meant that plaintiff had proved her superior qualifications, then the question of the defendant's burden to prove that she was inferior would have never arisen.

Similarly in Furnco, 438 U.S. at 576, the Court concluded that the plaintiffs established a prima facie case by proving that: "they were members of a racial minority; they did everything within their power to apply for employment; [the defendant] has conceded that they were qualified in every respect for the jobs which were about to be open; they were not offered employment ...; and the employer continued to seek persons of similar qualifications." (Footnote omitted). The Court did not require proof that the plaintiffs were ~~more~~

qualified than the persons actually hired, but only that the plaintiffs were "fully qualified." *Id.* at 570. The defendant's contention that its hiring practice resulted in "highly qualified," "experienced," "skilled and competent," workers, *id.* at 571-572, was properly considered at the second and third stages of the litigation, and not as an aspect of the prima facie case. *Id.* at 576-80.

The lower federal courts are unanimous in concluding that proof that the plaintiff possesses the minimum qualifications is all that is required to satisfy the qualifications element of the *McDonnell Douglas* prima facie case.⁶³

⁶³Seventh Circuit: *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134-35 (1985).

Eighth Circuit: *Hawkins v. Anheuser-Busch, Inc.*, 397 F.2d 810, 813 (8th Cir. 1983).

Ninth Circuit: *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1460 (continued...)

In several recent cases, the Court of Appeals for the Fourth Circuit appears to have misunderstood the role of the prima facie case and has placed unduly harsh burdens of proof on the plaintiff. The district court's ruling that the plaintiff must establish her superior qualifications in order to make out a prima facie case may have been based on this same fundamental misconception. This misunderstanding, which seems to be gaining momentum, will, if not corrected,

⁶³(...continued)
(9th Cir. 1985), cert. denied, 106 S. Ct. 1267 (1986); *Lynn v. Regents of University of California*, 656 F.2d 1337, 1344-45 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

Tenth Circuit: *Burris v. United Telephone Co.*, 683 F.2d 339, 342-43 (10th Cir.), cert. denied, 459 U.S. 1071 (1982);

District of Columbia Circuit: *Mitchell v. Baldrige*, 759 F.2d 80, 83 (D.C. Cir. 1985).

result in improper jury instructions and improper dismissals of meritorious claims.

Relying on language to the effect that the prima facie case "give[s] rise to an inference of unlawful discrimination,"⁶⁴ the Fourth Circuit has required a higher level of proof at the prima facie case stage than is mandated under McDonnell Douglas and Burdine.⁶⁵ The fundamental misunderstanding that has led the Fourth Circuit into error is the

⁶⁴E.g. Burdine, 450 U.S. at 253.

⁶⁵See, e.g. Robinson v. Montgomery Ward, 823 F.2d 793 (4th Cir. 1987), petition for cert. filed, No. 87-801 (November 12, 1987); Lytle v. Household Mfg. Inc., No. 86-1097, slip op. (October 20, 1987); Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986) (en banc); Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), cert. denied, 105 S.Ct. 3489 (1985). See also Foster v. Tandy Corp., 44 Fair Empl. Prac. Cases 1518 (September 16, 1987) (judgment notwithstanding the verdict entered, overturning jury verdict in favor of plaintiff).

assumption that it is the plaintiff's prima facie case alone that supports an inference of discrimination.⁶⁶ The Court has repeatedly made clear that this is an incorrect assumption. Rather, the inference of discrimination arises from the combination of the prima facie case and the employer's failure to provide an explanation for its decision. "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of

⁶⁶The Court in Holmes v. Bevilacqua reasoned that the plaintiff's proof that he was a minority, that he was qualified, that he applied and that he was rejected in favor of a white person, was not sufficient "to justify the presumption of discrimination." 794 F.2d at 146-147. Similarly, in Moore, the Court reasoned that the McDonnell Douglas factors did not support "the finding of intentional discrimination." 754 F.2d 1110.

impermissible factors." Furnco, 438 U.S. at 577.

Under the McDonnell Douglas method of proof, the employer's asserted reason for its action, or the employer's failure to produce such a reason, often is the central piece of evidence. The employer's inability even to articulate a reason for its decision speaks volumes. Because the lack of any articulated non-discriminatory reason is such strong proof of discrimination, it is entirely appropriate that the rest of plaintiff's evidence make only a supporting contribution to the inference of discrimination.

Thus, the prima facie case standard, as applied in McDonnell Douglas and Burdine, is justified by the central importance of the employer's articulated reason, the efficiency gained by requiring the employer to come forward

with this reason at an early stage of the trial and the relative ease with which the employer can meet its burden of rebutting the prima facie case. It is neither necessary nor appropriate to use the prima facie case as a vehicle for wholesale dismissal of allegedly non-meritorious cases. Unless the employer is unable to articulate a legitimate, non-discriminatory reason, the plaintiff's case is not sufficiently far enough along at this point to make a judgment whether there is sufficient evidence to raise a triable issue. By definition, the bulk of plaintiff's evidence of intent will come at the pretext stage, after the issues have been focused by the employer's articulation. Thus, the Court should reaffirm that the McDonnell Douglas and Burdine criteria still govern proof of a prima facie case.

Conclusion

For the reasons stated, the decision of the court of appeals should be reversed and the case should be remanded for a new trial.

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Supreme Court, U.S.
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JOSEPH P. STANCO, JR.

In The
Supreme Court of the United States
October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a separate claim for racial harassment is cognizable or must be submitted to the jury under 42 U.S.C. § 1981, independent of a parallel Title VII or § 1981 claim for discriminatory promotion and discharge?

2. Whether the Plaintiff in a claim under 42 U.S.C. § 1981 has the burden of proof of showing that she was better qualified than another employee who was promoted, after the employer has offered evidence that superior qualifications were the basis of such promotion and the claimant has shown no "other unlawful criteria?"

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| OTHER AUTHORITIES: | |
| 42 U.S.C. § 1981 (1982) | passim |
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No. 87-107

In The
Supreme Court of the United States
 October Term, 1987

BRENDA PATTERSON,
Petitioner,

vs.

McLEAN CREDIT UNION,
Respondent.

**ON WRIT OF CERTIORARI TO
 THE UNITED STATES COURT OF APPEALS
 FOR THE FOURTH CIRCUIT**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner's Brief has inaccurately represented the facts and omitted pertinent matters to such a degree that the Respondent is compelled to address the Statement of the Case prior to presenting its argument.

The Respondent, McLean Credit Union, is a financial institution chartered by the State of North Carolina making loans and accepting deposits solely from a defined field of members. At all times relevant to this cause of action, the field of membership for McLean Credit Union was limited to the employees of McLean Trucking Company. However, other than this relationship, McLean Credit Union and McLean Trucking Company were separate corporate entities and McLean Trucking Company had no direct responsibilities with regard to the operation or policies of the Credit Union. TR¹ 3-79 to 3-80.

¹Consistent with Petitioner's Brief, references are to the Transcript of Trial, November 12, 13, 14, 15, 18, 1985.

The Petitioner, Brenda Patterson, was employed by the Respondent, McLean Credit Union, in 1972 as a "File Co-Ordinator." TR 1-20; TR 1-99. As the result of a decline in business in 1981 and 1982, the Petitioner and two other general clerical employees (both white) were laid off. TR 3-82 to 3-93. Notwithstanding Petitioner's contentions to the contrary, seniority was neither the company policy nor a criteria used in determining these layoffs and no competent evidence was tendered showing otherwise. TR 3-96. In accordance with the layoff procedure adopted, the Respondent terminated these employees, including Petitioner, after six months without recall. TR 3-91 to 3-92.

Susan Williamson, a white, was hired by the Respondent in 1974 as an "Accounting Clerk". TR 3-105. Mrs. Williamson had completed two years of college and was a Dean's List student. She had completed courses in college in Accounting I and II, Economics I and II, College Math, Calculus I, II and III and Business Finance and expressed an aptitude and enjoyment in working with figures. Def. Ex. 6, TR 2-33, 4-106.

Brenda Patterson admittedly was hired as a File Co-ordinator or filing clerk. However, because McLean Trucking Company performed the payroll functions for the Credit Union as an accommodation to Respondent, Mrs. Patterson's job classification was listed as "Accounting Clerk" on her original rating classification card in order to be consistently reflected under the McLean Trucking Company job classifications. TR 3-82, 3-105 to 3-107; (Pl. Ex. 3, TR 1-40, 1-45). Between 1972 and 1982 the maximum number of general office hourly employees (such as Petitioner and Williamson) employed by the Respondent was nine, including at all times the Petitioner. TR 3-82 to 3-83.

Petitioner contends in her brief that she told Respondent's President, Stevenson that she was interested in bookkeeping or secretarial jobs.² However, the record clearly shows that this statement was made to Mr. Steer

at McLean Trucking Company, a separate corporate entity in a prior separate interview. TR 1-22 to 1-23; 3-40. There is no evidence that any such request was made to Mr. Stevenson or to any of Petitioner's supervisors at the Credit Union. To the contrary, Petitioner admits that during her employment, she never asked or made any inquiry for any promotion to or training for an accounting position or any other position. TR 2-61 to 2-62. During Williamson's employment at McLean, she worked solely in the accounting area, TR 2-33, except for a brief transfer to data processing from October 1, 1979 to February 15, 1980. TR 2-150 to 2-160.

In 1982, in recognition of her satisfactory job performance³, Williamson received a title change from "Account Junior" to "Account Intermediate." However, there were no changes in Williamson's job responsibilities, functions or supervisor subsequent to this change. Contrary to Petitioner's contentions, there was no job vacancy before or after Williamson's title change. The Respondent hired no other employees after Williamson's title change. Williamson received a pay increase but continued her same duties. TR 4-26 to 4-28.

Contrary to her contentions, Petitioner was not qualified for nor did she have the experience, aptitude or qualifications to perform the accounting job. Evidence further showed that Williamson was more qualified than Petitioner to do each job function required for the accounting position. TR 4-28 to 4-32. Additionally, each year from 1980 through 1982, Williamson's annual evaluations exceeded Petitioner's. TR 4-33 to 4-35; (Pl. Ex. 5, TR 1-62, 1-65; Def. Ex. 4, TR 2-30, 4-106; Def. Ex. 6, TR 2-105, 4-106;

²Petitioner puts great emphasis on the alleged testimony of Warren Behling that Williamson did not grasp accounting functions (Brief for Petitioner at pp. 11-12). In fact, Behling testified that what Mrs. Williamson did not grasp was data processing and computer programming TR 2-190 to 2-191. Further, the significance of Behling's testimony is irrelevant or severely limited because of his termination from the company for poor job performance and employer relationships prior to the onset of the period of limitations applicable to this case. TR 3-114 to 3-115.

³Brief for Petitioner at pp. 9-10.

Def.Ex. 16, TR 4-31, 4-106; Def.Ex. 17, TR 4-31, 4-106; Def.Ex. 20, 4-31, 4-106).

Further, Petitioner's application test showed that Petitioner attempted to answer only four of the fifteen mathematics questions. Of the four questions attempted, only one was answered correctly. TR 4-95 to 4-97; (Def.Ex. 21, TR 4-93, 4-106).

Finally, when the Petitioner worked part-time as a teller, she indicated to the President of the Credit Union that such work was too much pressure. There was evidence that Petitioner was poor at "balancing" and made numerous errors. Petitioner indicated that she did not want to do teller work. TR 3-103 to 3-104.

Petitioner alleges that she was discriminated against because she was not considered for the job of Account Intermediate which was the "promotion" received by Williamson. TR 1-45 to 1-48. However, the accounting positions required more numerical aptitude and bookkeeping skills than the teller position which Petitioner could not adequately perform. TR 4-37 to 4-38.

Petitioner's assertions that "throughout the time she worked at McLean Credit Union, [she] was subjected to abusive and demeaning terms and conditions of employment" and that she was "constantly scrutinized and criticized" are simply not supported by the record. The record reflects only two incidents of alleged racial remarks made to Patterson during her ten year employment. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women.⁹ TR 3-96 to 3-97. The only

⁹Brief for Petitioner at pp. 3-4.

¹⁰Although this alleged instance occurred in 1972 at an amicus time for many businesses as they integrated their work force and is far outside the applicable three year statute of limitations, the District Court allowed the testimony as background and to support the element of "intent" required in a Section 1981 case. Mr. Stevenson denied this comment, but admitted talking with the employees about hiring a minority for the first time: "... I wanted them to be comfortable with it and I wanted the

(Continued on following page)

other statement which Petitioner testified was a racial remark was a statement allegedly attributed to Respondent's President in 1976 that—"blacks were slower than whites by nature." TR 1-88. Respondent's President denied the remark. TR 3-109. Although Petitioner complains that she received personal criticism during staff meetings, the record is clear that such criticisms were business related, were made without personal comment and reflected errors which she admittedly had made prior to the date of the meeting. Tr 1-89; TR 2-72 to 2-78. She further admits that whites were also criticized at staff meetings. TR 2-72. Further, she could not recall the time periods such criticisms occurred and whether they were within the period of limitations. TR 2-73 to 2-76.

Although throughout the trial of this matter Petitioner consistently complained of an inordinate amount of work being placed upon her and that she allegedly did the work of three people, TR 1-25, the evidence is clear that she was placed on probation and was continually counselled and assisted because of slow work.¹¹ TR 3-91; 3-111 to 3-114;

(Continued from previous page)

minority to be comfortable with it . . . I wanted to make sure that these people, the white people as well as the black person was comfortable in working in that environment." TR 3-126, 3-128.

¹¹Likewise, this alleged comment was outside the period of limitations.

Evidence introduced at Trial was indicative of Petitioner's history of slow work and poor job performance. In 1977 she was placed on probation for "slow work and poor job performance." (Def.Ex. 6, TR 2-102, 4-106) Her 1979 performance evaluation noted "Brenda's speed of work is somewhat slow . . . Brenda's teller activity produces too many errors . . . [Brenda] does not possess the knowledge to work in other areas of the office . . . Brenda's performance is less than . . . hope[d] [for]." (Def.Ex. 3, TR 2-29, 4-106) The 1978 evaluation commented "Brenda's work speed is slow . . . Brenda's work is slower than desired . . . Her work on the teller line is not satisfactory as she continues to make teller errors in balancing . . ." (Def.Ex. 7, TR 2-102, 4-106) The 1981 evaluation and the 1982 evaluation, both by a different supervisor than the 1978 and 1979 evaluations also noted that she could increase her speed. (Def.Ex. 5, TR 2-30, 4-106; Def.Ex. 16, TR 4-31, 4-106)

and that subsequent to her termination, the job functions which she had been previously performing were absorbed by other members of the staff without the necessity of hiring additional personnel. TR 4-45.

Petitioner further contends that she was racially harassed because Respondent's President "stared" at her. TR 1-38 to 1-39. Mr. Stevenson contends that he necessarily observed the employees at their work. TR 3-100 to 3-110. Petitioner concedes that this observation was from as much as forty feet away, TR 2-86; and that to observe her work in the vault, it was necessary to stand at or near the vault door. TR 1-101.

There was no formal training available to any clerical employee and no employee including Williamson received any job training that was not available to all employees.⁸ In fact, Petitioner received additional help and training. TR 2-23; TR 2-28; TR 3-111.

Petitioner misleads the Court by asserting that she was "never able to find out about promotion opportunities until after the decisions had been made" and that "several white workers with less education, less seniority and less experience than Patterson were hired or promoted" while she was not.⁹ In fact Petitioner offered evidence at trial of only one "promotion" for which she contended she was the object of racial discrimination—that of Williamson to the position of Account Intermediate. TR 1-46 to 1-47. Petitioner's contention that white workers with less education, less seniority and less experience than she had were hired or promoted to secretarial or bookkeeping positions while she was not, is not only a misstatement of the evi-

⁸The only evidence offered by the Petitioner of discriminatory training opportunities was her own direct testimony consisting of a single unsubstantiated allegation that Williamson "was given special training for this position." TR 1-45. Petitioner offered no evidence describing what this "special training" consisted of. In contradiction, the Respondent showed that Williamson did not receive any special training. TR 4-110 to 4-112 and that the employer had no formal training programs. TR 4-38.

⁹Brief for Petitioner at p. 10.

dence, but such allegations concern matters clearly outside the statute of limitations. Further, Petitioner offered no evidence that either education or seniority were criteria used by Respondent in making promotions.¹⁰

Finally, Petitioner is incorrect in her allegation that she was denied a "merit" increase in salary that was given to white employees.¹¹ To the contrary, other black employees were given a "merit" increase in 1982 while "merit" increases were denied to other white employees. Merit raises were given on the basis of performance and were not automatic raises. TR 3-108.

Likewise, Petitioner's contentions that "when secretarial or bookkeeping positions opened, white workers were hired or promoted into the positions, while the black workers remained in the file room,"¹² is a gross misstatement of the testimony. The uncontradicted evidence was that no blacks ever applied for a secretarial position. TR 4-11 to 4-12. Further, Patterson testified that she requested to move her desk from behind the teller line to the vault where the filing took place. TR 1-100 to 1-101. Lastly, Carrie Worsley, a black, who was at all times employed as a teller, worked on the teller line and not in the vault or file room. TR 1-42.

Following her termination, the Petitioner pursued and exhausted her administrative remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) and received on June 20, 1983 a "Notice of Right to Sue." JA p.18. The Petitioner chose not to file an action under Title VII for racial harassment or disparate treatment and instead filed this action under 42 U.S.C. § 1981 on January 25, 1984. JA pp. 5-16.

¹⁰Nevertheless, greater education and seniority do not outweigh more direct experience. *Young v. Lehman*, 748 F.2d 194, 196 (4th Cir. 1984), cert. denied, 471 U.S. 1061 (1985).

¹¹Brief for Petitioner at p.12.

¹²Brief for Petitioner at p.9.

SUMMARY OF ARGUMENT

I. A separate discrete claim for racial harassment is not cognizable under § 1981. Title 42 U.S.C. § 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens" It is well established that § 1981 may provide a cause of action parallel to Title VII, 42 U.S.C. § 2000(e) in cases of racial discriminatory practices in hiring, firing and promotion. The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e), et seq. makes employment practices unlawful that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." It has further been established that the remedies under § 1981 and Title VII are separate and distinct. *Jackson v. Railway Express Agency, Inc.*, 421 U.S. 434 (1975).

In addition to actions for discrimination in hiring, firing or promotions, Title VII also makes actionable a racially discriminatory work environment. *Rogers v. Equal Employment Opportunity Comm'n.*, 434 F.2d 234 (5th Cir. 1971) cert. denied, 406 U.S. 957 (1972). However, a separate discrete cause of action for racial harassment is not cognizable under Section 1981.

The legislative history and plain and ordinary construction of the language of § 1981 support the contention that a separate discrete claim for relief for racial discrimination will not stand when isolated from a claim for racially discriminatory hiring, firing or promotion.

Section 1981 prohibits discrimination in the "making and enforcing of contracts." Beginning with the decision of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) this Court has consistently interpreted the legislative history of § 1981 as granting the "competence and capacity" to contract. Further, the cases in this Court addressing the legislative history and interpretation of § 1981 have con-

sistently interpreted the statute as one affecting economic rights. See, e.g., *Ramsey v. McCrary*, 427 U.S. 160 (1976); *Goodman v. Lukens Steel Co.*, 482 U.S. —, 107 S.Ct. 2517 (1987); see also, *Tillman v. Wheaton-Haven Rec. Assn.*, 410 U.S. 431 (1973) (construing the economic impact of the parallel provisions of 42 U.S.C. § 1982.)

Racial harassment in the work place that does not impact on hiring, discharge or promotion decisions has no effect on the economic rights of a minority employee and does not affect such an employee's basic fundamental rights to "make and enforce contracts."

Although this Court has not yet addressed the issue of whether a separate independent claim of racial harassment is cognizable under § 1981, several other lower federal courts in addition to the Fourth Circuit have determined that such a claim is not cognizable. See, e.g., *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 732 (W.D.Mo. 1986); *Minority Police Officers Ass'n. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (M.D.Ind. 1985); *Howard v. Lockhard-Georgia Co.*, 272 F.Supp. 654 (N.D.Ga. 1974).

The basic fundamental rights granted to all persons, the same as white citizens, are the rights to enter into a contract and bind the other party to it and the right to enforce such contracts in court. Neither in 1866 nor in 1870 did "white citizens" have the right to bring an action strictly for harassment. It was not the intent of the Thirty-ninth Congress to grant such a substantive tort claim for relief. Other laws may grant remedies for harassment, such as Title VII, breach of contract actions, malicious interference with contracts, intentional infliction of emotional distress or other actions and § 1981 grants access to the courts and the rights of all persons to maintain such independent causes of action. However, § 1981 establishes no separate cause of action for racial harassment.

Although there is some confusion in the courts as to a differentiation of the various rights and remedies available under Title VII and § 1981, such decisions generally

have not supported an independent claim for racial harassment or hostile working environment separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices. It is not disputed that the statutes have many similarities and that the proof scheme established in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) is applicable to both statutes. Further, it is well established that intentional racial discrimination is necessary to support a claim under § 1981. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). However, even under Title VII "not all work place conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment" *Merrill Savings Bank v. Faxon*, No. 84-1979 (U.S. June 19, 1986), slip op. 9. In many cases, the courts have found that the alleged racial practices were not so oppressive or working conditions so intolerable as to enforce a constructive discharge claim or trigger a claim under Title VII. *Johanna v. Boney Bread Co.*, 646 F.2d 1220 (9th Cir. 1981); *Martin v. Cihlack, S.A.*, 782 F.2d 212 (7th Cir. 1985); *Muller v. United States Steel Corp.*, 309 F.2d 923 (10th Cir.) cert. denied, 423 U.S. 823 (1975). If such alleged adverse and hostile working conditions were not so oppressive as to force the resignation of the Petitioner or support a claim of constructive discharge, then it is illogical to assume that such actions could stand alone under Title VII, much less § 1981.

Ultimately, the facts of this case fall far short of the *prima facie* showing necessary to support a claim of racial harassment. Assuming *arguendo* that such a claim is cognizable under § 1981, it is reasonable to assume that the *McDonnell-Douglas* proof scheme is also applicable to such claims. First of all, the applicable North Carolina three year statute of limitations bars any allegations or claims prior to January 28, 1981. The remaining allegations by the Petitioner (which are unsubstantiated as to date) are that the Respondent's President stared at her,

gave her an inordinate amount of work, criticized her at staff meetings and requested that she dust and sweep. Even taking all of the Petitioner's allegations as factually correct and undisputed, they still fall far short of conditions "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). After Respondent's evidence offering non-discriminatory explanations in response to such allegations, Petitioner offered no rebuttal to show pretext. Petitioner's allegations are insufficient to support a claim of racial harassment even under Title VII.

II. Likewise, Petitioner's evidence with regard to her allegation of promotion discrimination was insufficient to support a *prima facie* case. To establish such a *prima facie* case, the Petitioner must meet the elements required by *McDonnell-Douglas v. Green*, 411 U.S. 792, 802 (1973).

The evidence regarding the promotion incident was that Susan Williamson had been working for 7½ of the prior 8 years as an Account Junior and because of her satisfactory job performance, she received an upgrade in title and pay. Mrs. Williamson received no additional or different job responsibilities. No job vacancy was open, filled or created by the so-called promotion. Mrs. Williamson had completed college courses in calculus, accounting and business finance. The Petitioner who was at all times employed as a filing clerk had experienced difficulty in balancing her books when she worked as a part time teller, disliked the pressure of working as a teller, had no experience in the accounting functions, had received numerous evaluation notes for slow work and lacked the necessary education, skills or aptitude to perform the accounting position. However, the Petitioner claims that she was entitled to the position of Account Intermediate and that the Respondent unlawfully discriminated against

her by advancing Mrs. Williamson rather than providing this position to the Petitioner. The only reasonable inference which any reasonable person could draw from these facts is that there was no "promotion" for which there was a vacancy and that Petitioner produced no evidence that she was qualified to perform the accountant functions. However, the Court allowed the claim to go to the jury, obviously with the opportunity in the event of a verdict adverse to the Respondent, to reconsider Petitioner's *prima facie* case at Respondent's Motion for a judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

Once the court had determined to allow the issue of promotion discrimination to be resolved by the jury, the Respondent was compelled under a strict application of the *McDonnell-Douglas* proof scheme to offer a non-discriminatory reason for its decision. Within the context of established case law, the simple explanation for the "decision" was Mrs. Williamson's superior qualifications. Once this evidence was proffered, the burden was on the Petitioner to show pretext or that Respondent's explanation was unworthy of credence. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Petitioner contends that such pretext could have been shown not only by showing superior qualifications but (1) by showing equal qualifications; (2) by showing that the employer did not rely on qualifications; or, (3) by showing that the employer's explanation was not credible. Because Petitioner offered no rebuttal evidence and the record was void of any evidence that Petitioner's qualifications were equal to Mrs. Williamson's or that the employer did not rely on qualifications in making its decision or that the reason given by the employer was not credible, the court correctly charged the jury in accordance with established precedents that the Petitioner must show her superior qualifications. *Young v. Leamon*, 748 F.2d 124

(4th Cir. 1984); *Anderson v. City of Bessemer*, 717 F.2d 149 (4th Cir. 1983), *rev'd on other grounds*, 470 U.S. 564 (1985); *EEOC v. Federal Reserve Bank of Richmond*, 678 F.2d 633 (4th Cir. 1983) *rev'd on other grounds sub nom; Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). "The employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Therefore, where there is no evidence of an unlawful criteria and Respondent has proffered a non-discriminatory reason for its decision, it is incumbent upon the Petitioner to show her superior qualifications.

ARGUMENT

I.

THE PETITIONER WAS NOT ENTITLED TO THE SUBMISSION OF A SEPARATE ISSUE OF RACIAL HARASSMENT UNDER § 1981

A. A Separate Discrete Claim for Racial Harassment Is Not Cognizable Under § 1981

The issue to be determined in this matter is whether racial harassment is cognizable under 42 U.S.C. § 1981 (1982) separate and apart from an actionable claim of racially discriminatory hiring, firing, or promotion. The statute, 42 U.S.C. § 1981, provides:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

(emphasis added).

Obviously racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under § 1981, and may give rise to a discreet claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e). See, e.g., *EEOC v. Murphy Motor Freight*, 488 F.Supp. 381, 384-86 (D. Minn. 1980); and, *United States v. Buffalo*, 457 F.Supp. 612, 631 (W.D.N.Y. 1978), *modified on other grounds*, 633 F.2d 643 (2d Cir. 1980). However, the pertinent language of Title VII which makes unlawful "discriminat[ion] against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race," 42 U.S.C. § 2000(e) (a) (1982) (emphasis added) is in sharp contrast to § 1981's prohibition of discrimination in making and enforcing contracts. Although a cause of action for racial harassment is cognizable under Title VII and the Petitioner in this action requested and received a Notice of Right to Sue from the EEOC, she elected to file her action solely under § 1981.¹²

Various courts have undertaken to define racial harassment. In a Title VII case, the Fifth Circuit held that Title VII was "aimed at the eradication of such noxious practices . . . [as] . . . working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority [] workers." *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The court went on to say that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not necessarily fall within Title VII *id.* at 238. Another court rec-

¹²See, JA p.18. Petitioner received a notice of right to sue on or about July 5, 1983; however, this action was not instituted until January 25, 1984 and any cause of action stated under Title VII would have at that time been barred by the applicable statute of limitations.

ognized that derogatory remarks would constitute a Title VII violation "upon attaining an excessive or opprobrious level," or that "a malicious or inordinate racial slur usage would result in defendant's liability." *Faugha v. Peol Offshore Co., Etc.*, 683 F.2d 922, 925 (5th Cir. 1982). Likewise, the Court in *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) "recognized that derogatory comments could be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII."

Respondent has conceded that intentional racial animus is an element of and therefore relevant to Petitioner's claims of racially discriminatory discharge and promotion practices. However, several lower federal court cases have commented that separate claims for racial harassment are not cognizable under § 1981. See, e.g., *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 752 (W.D.Mo. 1986); *Minority Police Officers Assn. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (N.D.Ind. 1985) *aff'd* 801 F.2d 764 (7th Cir. 1986); and *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974).

In *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 752 (W.D.Mo. 1986), the court stated:

"I believe the working conditions issue is a Title VII issue and not an independent issue under 42 U.S.C. § 1981. See *Minority Police Officers v. City of South Bend*, 617 F.Supp. 1330, 1352 n.52 (N.D.Ind. 1985). It seems to be assumed in some cases, however, that the statutes run parallel, except for the more liberal damage potential of § 1981. *Krehbiel v. Clegader Plastic Products Corp.*, 772 F.2d 1230 (6th Cir. 1985) *cert. denied*, — U.S. —, 106 S.Ct. 1197 (1986). But Title VII by its terms is more comprehensive than § 1981, and, except as to damages and to time limits, cuts deeper."

Id. at 757 n.5 (emphasis added).

Further, in *Minority Police Officers Assn. of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1320 (N.D.Ind. 1985), the court stated:

The relationship between the employee and his working environment is encompassed within the 'terms, conditions or privileges of employment' language of Title VII. Section 1981 of Title 42 United States Code is not specifically addressed to employment discrimination and this court has found no cases to indicate a plaintiff can state a claim under § 1981 based on working conditions alone. However, conditions in the work place, including racially derogatory slurs and incidents may be used to show discriminatory intent. Nor has the Court found any cases indicating that such a claim can be stated under the Fourteenth Amendment.

Id. at 1352 at n.52 (emphasis added).

In *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974), an attempt to use § 1981 for the purpose of seeking emotional distress damages was rejected. The Court stated that:

[T]he judicially legislate a con-current and broader remedy under Section 1981 would invite every plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII. Why should a claimant genuinely participate in the conciliation procedures of Title VII, or his attorney advise him to do so, when larger awards await if he refuses and proceeds to suit? Such a holding would frustrate the clear intent of Congress that racial bias problems be resolved by conciliation. This the Court declines to do.

Id. at 857-858.

The pivotal issue in a determination of this case is an interpretation of the meaning of "to make and enforce contracts." To make such a determination, a closer look at the Legislative History of the statute and an interpre-

tation of the clear ordinary language of the statute is helpful.

The Legislative History of § 1981 has been discussed and analyzed on several occasions by this Court. See, e.g. *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968); *Ramsey v. McCrary*, 427 U.S. 160 (1976). This Court has determined that 42 U.S.C. § 1981 was drawn from both § 16 of the Voting Rights Act of 1870 and from § 1 of the Civil Rights Act of 1866. *Ramsey v. McCrary*, 427 U.S. 160, 168 n.8 (1976).¹⁸

During Reconstruction and the passage of these statutes, slaves for the first time were declared to be "citizens", to possess the rights to sue, to give evidence and to hold real and personal property, and to have full access to all the laws and be subject to all the responsibilities of citizenship. The grant of these rights to "all people" by § 1981 is primarily a grant of "capacity" rather than the substantive rights that flow from capacity. For the first time, slaves were given access to the courts and access to equal legal rights. It was not the intent of Congress to create a substantive tort of action for racial harassment by the passage of these statutes.¹⁹

In discussing the authority of Congress to enact the Civil Rights Act of 1866 under the Thirteenth Amendment, this Court wrote that:

¹⁸However, in a dissenting opinion addressing the legislative history of 42 U.S.C. § 1981, two justices of the Court concluded that this Section was derived solely from § 16 of the Voting Rights Act of 1870 which was passed under Congress' Fourteenth Amendment powers rather than § 1 of the Civil Rights Act of 1866 which was passed under Congress' Thirteenth Amendment powers. *Ramsey v. McCrary*, 427 U.S. at 202 (1976); (White, J., joined by Rehnquist, J., dissenting.)

¹⁹However it is now established that § 1981 does create substantive rights to contract. See *Johnson v. Railway Express* (Continued on following page)

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its “burdens and disabilities”—include restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sale and convey property, as is enjoyed by white citizens.”

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-441 (1968) (footnote omitted) (quoting *Civil Rights Cases*, 109 U.S. 3, 22 (1883) (emphasis added)).

Further, the Court wrote:

Of course, Senator Trumbull's bill would, as he pointed out, ‘destroy all [the] discriminations’ embodied in the Black Codes, but it would do more: it would affirmatively secure for all men, whatever their race or color, what the Senator called the ‘great fundamental rights’: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. As to those basic civil rights, the Senator said, the bill would ‘break down all discrimination between black men and white men.’

Id. at 432 (emphasis in original).

It is logical to assume that Congress meant fundamental legal capacities. Additionally, Senator Trumbull's remarks chiefly address economic rights. There is a great contrast between bestowing the capacity to contract or the right or capacity to enforce legal rights in the courts and

(Continued from previous page)

Agency, 421 U.S. 454, 457-461, 44 LEd.2d 295, 95 S.Ct. 1716 (1975). See also *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-238, 24 LEd.2d 386, 90 S.Ct. 400 (1969).

the grant of substantive rights and causes of action sounding in tort which necessarily regulate interpersonal relationships. Such an interpretation goes far beyond “those basic civil rights,” protected by the statute.

In his concurring opinion in *Rungton v. McCrary*, 427 U.S. 160 (1976), Justice Stevens clearly and succinctly declared:

There is no doubt in my mind that the construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property and to litigate and give evidence.

Id. at 189 (emphasis added).

Further, the dissent by Justice White with whom Justice Rehnquist joined states:

What is conferred by 42 U.S.C. § 1981 is the right—which was enjoined by whites—‘to make contracts’ with other willing parties and to ‘enforce’ those contracts in court. Section 1981 would thus invalidate any state statute or court made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites. . . .

....

. . . The legislative history of 42 U.S.C. § 1981 confirms that *the statute means what it says and no more, i.e., that it outlaws any legal rule establishing any person from making or enforcing a contract . . .*”

Id. at 194-195 (footnote omitted) (emphasis added).

Even the explanation of the “classic violation of § 1981” in the majority opinion in *Rungton* resounds with concepts and phrases associated with traditional contractual relationships.

[A] Negro's [§ 1981] right to ‘make and enforce contracts’ is violated if a private offeror refuses to ex-

tend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white officers.

....

... The parents ... sought to enter into a contractual relationship with [the schools]. Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments. The educational services of [the schools] were advertised and offered to members of the general public. But neither school offered services on an equal basis to white and non-white students.

Id. at 170-173 (footnotes omitted) (emphasis added).

While Plaintiff cites *Rusyon* to support their claim, in fact *Rusyon* involved the defendants' direct refusal to enter into a contract with black applicants. The plaintiff was effectively denied the right to contract for educational services. Such a case presents a far different issue than where racial harassment is directed toward a student enrolled. While admittedly such conduct would be discriminatory, it would not deny the plaintiff the right to enter or enforce a contract. See e.g. *Saunders v. General Services Corp.*, Slip Op. No. 86-0229-R (E.D.Va. 1987), appeal pending, No. 87-2175 (4th Cir.).

In *General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982), this Court addressed the duties under § 1981.

The question is what duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to insure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enu-

merated in the statute, including the equal right to contract...."

Id. at 396 (original emphasis).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court determined that under § 1981 the running of the statute of limitations is not suspended during the pendency of a timely filed administrative complaint with the EEOC under Title VII. Although the employer conduct alleged to have occurred was discrimination with respect to seniority rules, job assignments and discharge, each of these are unique to the economic factors generally relevant to a contractual relationship. This is not inconsistent with the idea that § 1981 was passed to protect property and economic rights and does not address interpersonal relationships.

Further, the Court's language in *Jones*, 392 U.S. 409 (1968) supports the interpretation that § 1981 only confers the right to enter into a contract and bind the other party to it. In that decision, the Court stated simply that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981." *Jones*, 392 U.S. at 441 n.78 (emphasis added).

In *Jones*, the specific issue before the Court involved whether § 1982 applied to private, and not only state action in the sale or rental of property and, if so, whether such scope was constitutional. In its examination of § 1982, the Court compared § 1982 to the Fair Housing Act. Unlike the Fair Housing Act, the Court explained, § 1982 "is not a comprehensive open housing law." *Id.* 392 U.S. at 413 (1968). A like analysis should distinguish § 1981 from Title VII, for § 1981 is not a comprehensive employment law. In summary of the comparison between the two statutes, the Court noted the "vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property [] and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of authority." *Id.* at 417.

The above language supports the view that § 1981 was intended only to procure the opportunity, whether it is to contract for work or contract for education. After the contract is in effect, whatever conduct may violate an individual's rights, breach the contract or affect the terms or conditions of the contract, whether express or implied, is remedied by other laws. For example, an action under Title VII, an action for intentional infliction of emotional distress, breach of contract actions, malicious interference with contract or other actions may be instituted.¹⁶

Furthermore, this Court has recently very generally held in *Goodman v. Lukens Steel Co.*, 482 U.S. —, 107 S.Ct. 2617 (1987) that the Defendant company had violated both Title VII and § 1981 with regard to the discharge of employees during their probationary period, the toleration of racial harassment, initial job assignments, promotions and decisions on incentive pay. Such general language is used with regard to a case which includes activities, which is racially motivated, are obviously included in the protections offered by § 1981, i.e. promotion and discharge. Notwithstanding this general language, this Court also clearly stated that § 1981 grants competence and capacity to contract:

Insofar as it deals with contracts, [§ 1981] declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds. The provision asserts in effect, that *competence and capacity to contract shall not depend upon race.*

Id. at —, 107 S.Ct. at 2621 (emphasis added).

¹⁶The fallacy of the argument propounded by the government in the Amicus Brief filed by the Solicitor General is that there exists causes of actions for breach of contract or malicious interference with contract which are directly applicable to a "breach of the covenant of good faith and fair dealing." There is no reason to expand § 1981 far beyond any intent of the Thirty-ninth Congress in order to create a substantive right or remedy for such a cause of action under § 1981. Indeed § 1981 grants the capacity or competence of *all* persons to institute any such claims and does not necessarily create such a substantive cause of action.

In a separate opinion, Justice Brennan joined by Justice Marshall and Justice Blackmun, expressed the opinion that "Congress clearly believed that freedom would be empty for black men and women if they were not also assured an equal opportunity to engage in business, to work, and to bargain for sale of their labor." *Id.* at —, 107 S.Ct. at 2628. Justice Brennan further quoted from the legislative history:

[Section 1981's] object is to secure to a poor, weak class of laborers the right to *make contracts* for their labor, the power to *enforce the payment* of their wages, and the means of *holding* and enjoying the proceeds of their toil. Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom).

Id. at —, 107 S.Ct. at 2628 (emphasis added). Such language translates directly to prohibitions against racially discriminatory hiring and discharge practices and access to the courts. It is well established that § 1981 covers these matters. Again a dominant concern in the interpretation of § 1981 is the effect on economic rights. Justice Brennan further concluded that:

[T]he historical origins of § 1981 therefore demonstrate its dominant concern with *economic rights*. The preeminence of this concern is even clearer if one looks at § 1981 in conjunction with 42 U.S.C. § 1982, [42 U.S.C. § 1982] which was simultaneously enacted. The plain language of § 1982 speaks *squarely and exclusively to economic rights and relations.*

....

... [I]t is apparent that the primary thrust of the 1866 Congress was the provision of equal rights and treatment in the matrix of *contractual and quasi contractual relationships* that form the *economic sphere*.

Id. at —, 107 S.Ct. at 2629 (emphasis added) (Brennan, J., joined by Marshall and Blackmun, J.J., concurring in part and dissenting in part).

In *Tillman v. Wheaton-Haven Rec. Assn.*, 410 U.S. 431 (1973), it was held that an association which operated a community swimming pool was not a private club and

that denial of membership to a Negro couple violated 42 U.S.C. § 1982. The Court noted that the operative language of both §§ 1981 and 1982 was traceable to the act of April 9, 1866 and saw no reason to construe those sections differently when applied to these facts. *Id.* at 410-411. In reaching its conclusions, this Court looked closely at the economic impact and quoted from the dissent in the lower court:

Several years from now it may well be that a white neighbor can sell his home at a considerably higher price than Dr. and Mrs. Press because the white owner will be able to assure his purchaser of an option for membership in Wheaton-Haven. Dr. and Mrs. Press, however are denied this advantage. 451 F.2d at 1223. *Id.* at 437.

This Court further noted that "the automatic waiting-list preference given to residents of the favored area may have affected the price paid by the Presses when they bought their home. Thus the purchase price to them . . . may well reflect benefits dependent on residency in the preference area." *Id.* at 437. The emphasis on purchase price reflects that the economic factors were those being protected in these statutes, not the right to bring an action solely based on racially motivated slurs and incidents in the workplace.

Lower federal courts have also made it clear that § 1981 was intended to protect economic contractual relationships. Whereas, Title VII was intended by Congress to prohibit a discriminatory and offensive work environment. For example, the Fifth Circuit in *Adams v. McDougal*, 695 F.2d 104 (5th Cir. 1983) discussed the applicability of § 1981 to contracting for employment:

The term contract, as used in § 1981, refers to 'a right in the promisee against the promisor, with a correlative special duty in the promisor to the promisee of rendering the performance promised.' *Cook v. Advertiser Co.*, 458 F.2d 1119, 1123 (5th Cir. 1972) (Wisdom, J., concurring).

In this case, despite the indefinite tenure of the job of the deputy sheriff, the sheriff and his deputies had

expectations arising from the deputy's employment. The Sheriff promised to pay his deputies a stated salary. In return, the deputies promised to perform their jobs. We hold that the employment relationship represented in this case was sufficient to bring Adams under the protective umbrella of § 1981.

Id., at 108 (emphasis added). The explanation of the Court clearly invokes concepts traditionally associated with the right to make and enforce contracts.

In *Howard Security Services, Inc. v. Johns Hopkins Hospital*, 516 F.Supp. 508 (D.Md. 1981), the District Court upheld the Plaintiff corporation's § 1981 cause of action based upon the hospital's alleged refusal to award a contract to the corporation because the president was black. Again, as *Howard* indicates, § 1981 addresses the right to make contracts and the legal right to enforce contracts. Other cases likewise support the view that § 1981 protects merely the right to make and enforce contracts.¹⁷

That § 1981 is addressed solely to the legal capacity to contract is discussed in detail in the dissenting opinion by Justice White, joined by Justice Rhenquist in *Rungow*. The opinion states:

Thus the legislative history of § 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites. . . ."

Rungow, 427 U.S. at 205. The opinion continued with a close look at such legislative history:

The fact that one of the leaders of the efforts to pass the Thirteenth Amendment statutes—Senator Stewart—included the right to 'make contracts' but not the right to 'purchase, etc., real and personal property' in the Fourteenth Amendment statute providing for equal rights under law which he sponsored

¹⁷See e.g. *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) (the Court recognized the Plaintiff's cause of action under § 1981 against an employer for refusing to hire the Plaintiff because his wife was black); *Macklin v. Spector Freight Systems*, 478 F.2d 979 (D.C.Cir. 1973) (Court of Appeals upholding Plaintiff's § 1981 claim alleging a practice of refusing to hire blacks).

four years later is strong evidence of the fact that Congress always viewed the right to 'make contracts' as simply granting equal legal capacity to contract. . . . Indeed, Senator Stewart specifically drew a distinction between the rights enumerated in the Fourteenth Amendment statute including the right to 'make contracts' and the real and personal property rights not so included. In connection with the Fourteenth Amendment statute he was asked:

'MR. POMEROY. I have not examined this Bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this Bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?'

He replied:

'MR. STEWART. No; it gives all the protection of the laws. If the Senator will examine this Bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.'

Id. at 209-210 (White, Rhenquist, J.J. dissenting) (original emphasis).

Justice White proved to be prophetic when he stated that "imaginative judicial construction of the word 'contract' is foreseeable." *Id.* at 212.¹⁸

No court has yet attempted to analyze and clarify the full extent of the distinctions between § 1981 and Title VII. Obviously, in the case of racially discriminatory promotion and discharge, there is an overlap of rights. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-462 (1975) (promotion); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (1972) (discharge). Title VII clearly

¹⁸Although the dissent opposed the extension and "reach of 42 U.S.C. § 1981 so as to establish a general prohibition against a private individual's or institution's refusing to enter into a contract with another person because of that person's race," *Id.* 427 U.S. at 192, the discussion of the legislative history and the plain meaning of the "right to make and enforce contracts," is equally applicable to this case.

covers a racially hostile work environment. *Rogers v. EEOC* 454 F.2d 234 (5th Cir. 1972); and at least some courts, including the Fourth Circuit in the case *sub judice*, have determined that such a claim is not actionable under § 1981. *Patterson v. McLean*, 805 F.2d 1143, 1145 (4th Cir. 1986). Other courts have recognized the danger in expanding § 1981 to cover all employment discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race." 42 U.S.C. § 2000(e)(2)(a); See, *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F.Supp. 732 (W.D.Mo. 1986); *Minority Police Officers Ass'n of South Bend v. City of South Bend, Indiana*, 617 F.Supp. 1330 (N.D.Ind. 1985); *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974).

If this Court determines that § 1981 broadly covers all incidents of the contractual relationship as is suggested by the Petitioner, then such a holding would grant broader and greater remedies in cases of racial discrimination than in cases of sexual discrimination, discrimination based upon age, religious discrimination, or discrimination based upon national origin. The ultimate effect and result is that Title VII and the conciliatory procedures so carefully constructed therein will become both unnecessary, useless and unadvisable because of the potential for greater monetary awards for racial harassment under § 1981. Surely this was not the intent of Congress.

The obvious distinction between Title VII and § 1981 in cases of racial discrimination is that § 1981 grants the capacity and competence to make and enter legal and binding contracts; while Title VII regulates the conditions of the work environment. As pointed out by the Fourth Circuit, "racially discriminatory hiring, firing and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection." *Patterson v. McLean*, 805 F.2d at 1145.

The plain simple language of § 1981 grants no more than the right of all persons to enter into and enforce promissory agreements that create a legal relation to do

or not to do a particular thing. A common sense reading of § 1981 supports the contention that the Thirty-Ninth Congress did not intend that the statute broadly cover racial harassment in the work place. On the other hand, racial animus that results in discriminatory hiring, promotion or discharge decisions is under the umbrella of § 1981 rights. Certainly, Respondent is aware of no case authority or legislative history indicating that in the Nineteenth Century whites were entitled to maintain actions against their employer for racial harassment. The statute grants only to "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." In contrast, rights to institute actions for all harassment were conferred by Title VII.

B. A Separate Discrete Action For Racial Harassment Under Section 1981 Cannot Stand Alone.

Many cases in the lower federal courts and even decisions by this Court have added to the difficulty in differentiating the "separate, distinct and independent" remedies available under Title VII and under § 1981.¹⁹ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

Obviously, many cases are prosecuted where claims are made under both Title VII and § 1981; and, many cases are prosecuted under both Title VII and § 1981 jointly where there are not only claims of racial harassment but racially discriminatory practices of hiring, firing and discharge. Because the statutes do overlap and the offer of proof is similar, there is seldom a need for the

¹⁹See, e.g., *Goodman v. Lukens Steel Co.*, 42 U.S. —, 107 S.Ct. 2617 (1987) (generally holding the Union was in violation of both Title VII and § 1981 for the toleration and tacit encouragement of racial harassment among other things.); *Lucero v. Beth Israel Hospital Geriatric*, 479 F.Supp. 452 (D.C.Col. 1979) (recovery allowed to Plaintiff for compensatory damage for mental pain and suffering under § 1981 where Plaintiff brought claims under both Title VII and § 1981); *Block v. R.H. Macy and Co.*, 712 F.2d 1241 (8th Cir. 1983) (recovery permitted under § 1981 for emotional distress in conjunction with her claim under Title VII and § 1981 for racially discriminatory discharge).

courts to differentiate under which statute a particular claim is sustained.

Generally, however, the cases have not supported an independent claim for racial harassment or hostile working environment under § 1981 separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices under § 1981.²⁰ This is the basis of the Fourth Circuit's decision that a separate independent claim for racial harassment, standing alone, is not cognizable under § 1981. *Patterson*, 805 F.2d at 1145-1146. In response to the cases submitted by the Petitioner, the Fourth Circuit observed: "None directly holds that racial harassment gives rise to a discrete claim under § 1981, as distinguished from recognizing that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under § 1981 and that it may give rise to a discrete Title VII claim." *Id.* at 1146.

In *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980), the court observed:

[w]hen § 1981 is used as a parallel basis for relief with Section 706 of Title VII against disparate treatment in employment, its elements appear to be identical to those of Section 706. *Garcia [v. Gloor]*, 609 F.2d [156] at 164; *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); see also, *Johnson v. Alexander*, 572 F.2d 1219, 1223 n.3 (and cases cited therein) (8th Cir. 1978), cert. denied, 439 U.S. 99 [] (1978).

Id. 616 F.2d at 121. (emphasis added).

In *Hamilton v. Rogers*, 791 F.2d 439 (5th Cir. 1986), the claimant brought claims under §§ 1981, 1983 and Title VII for alleged racial harassment and retaliation. The Court (on rehearing) held that the employer was liable only under Title VII. *Id.* at 445. A reading of the ap-

²⁰*Cf. Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), cert. denied, — U.S. —, 106 S.Ct. 1197 (1986) (submission of an issue to the jury under § 1981 by Mexican American for a claim of a hostile working environment allowed by the Sixth Circuit).

appropriate part of the opinion shows that the court, in restating the familiar *McDonnell-Douglass* proof scheme completes its analysis by concluding that "successfully meeting these requirements [the McDonnell-Douglass proof scheme] would also establish a successful case under 42 U.S.C. §§ 1981 and 1983; when these statutes are used as parallel causes of action with Title VII, they require the same proof to show liability. *Id.* at 442.

Petitioner contends that the lower federal courts have "unanimously concluded that discrimination in the terms and conditions of employment is actionable under § 1981.²¹ However, these cases involve parallel Title VII claims or claims involving promotion or discharge where harassment is an element of the claim rather than a separate distinct claim.²²

Even assuming *arguendo* that a separate discrete claim for racial harassment may be cognizable under § 1981, there is no ruling that such an issue must be submitted to a jury separate and apart from issues of promotion or discharge discrimination. In fact, most of the cases cited by the Petitioner involve cases where the claimant has brought claims under various federal statutes including §§ 1981, 1983 and Title VII for racial harassment, promotion discrimination, hiring discrimination, discharge discrimination and other claims which may be cognizable under these various federal statutes. Part of the problem in determining what causes of action, as opposed to what remedies, may be cognizable under each of these statutes, is the failure of the various courts to distinguish precisely what separate substantive claims might be enforced under the various and potentially applicable statutes.

The many constructive discharge cases which have been determined in the lower courts are helpful because they demonstrate that racial harassment generally is an element necessary in such cases rather than a separate

²¹See Brief for Petitioner at p. 35, n.12.

²²See Respondents' Brief in Opposition to Writ of Certiorari pp. 5-10 where these cases have previously been distinguished.

claim for relief. In *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974), the court indicated that where intentional racial prejudice impacted a minority employee's opportunities for promotion, § 1981 may be violated.

In *Irving v. Dubuque Packing Co.*, 689 F.2d 170 (10th Cir. 1982), the court affirmed a jury finding of unlawful failure to promote and remanded a constructive discharge claim for a new trial. The Court stated:

The constructive discharge is only actionable under 42 U.S.C. § 1981 if it is motivated by [] race []. In other words, an employee must be subjected to employment practices which are discriminatory and which make the working conditions intolerable, thus forcing the employee to quit. Further, the employer's action must be intended by the employer as an effort to force the employee to quit. *Muller v. United States Steel Corp.*, [509 F.2d 923 (10th Cir. 1975)]; *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981).

Id. at 172. The rationale is that racially discriminatory treatment which impacts on hiring, discharge or promotion decisions is actionable under § 1981 with regard to claims for racially discriminatory hiring, discharge or promotion decisions.

In *Martin v. Citibank, N.A.*, 762 F.2d 212 (7th Cir. 1985) the Court held that "[a] finding of constructive discharge in violation of § 1981 or Title VII requires that the trier of fact 'be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign'" (Citations omitted) *id.* at 221. In that case, "the evidence was insufficient as a matter of law to establish constructive discharge." The plaintiff testified that "her supervisor loudly mentioned her being polygraphed; complaints concerning her attitude to co-workers were unfounded; her supervisor had once given her the wrong combination to the night deposit box and that someone using his card once interfered with her deposit; and that she had been required to process deposit records while serving customers." *Id.* at 221.

In *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981), the court found no discrimination under § 1981 on plaintiffs' claims of disparate treatment and constructive discharge where plaintiffs alleged "close monitoring and harsh treatment . . . made his working conditions intolerable." "A constructive discharge exists when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." (Citations omitted). *Id.* at 1256. The court further stated that "a constructive discharge arises only when a reasonable person can find conditions intolerable." *Id.* at 1256. The court concluded by finding "no steady barrage of opprobrious racial comment" as would trigger a claim under Title VII. *Id.* at 1257.

Likewise, in *Muller v. United States Steel Corp.*, 509 F.2d 923 (10th Cir.) cert. denied, 423 U.S. 825 (1975), the court found that unfavorable job assignments and discriminatory failure to promote do not constitute constructive discharge. *Id.* at 929.

There is no controversy that racial harassment is an element of and a necessary part of the proof required in claims for racially discriminatory hiring, firing and promotion practices under § 1981. The significance of these cases is the degree of harassment necessary to support such claims. If the alleged practices are not so "opprobrious" as to support a claim of constructive discharge, then it is logical that such conduct cannot stand alone to support a claim for relief for racially discriminatory harassment or hostile working environment under § 1981. It is noteworthy that the Petitioner's claims alleging constructive discharge were dismissed by the trial judge upon Respondent's motion for summary judgment and are not before this Court.

C. Petitioner Has Failed To Sustain A Prima Facie Case Of Racial Harassment

Notwithstanding a determination that racial harassment or disparate treatment claims are cognizable under § 1981 absent a claim for racially discriminatory firing, hiring or promotion, this Petitioner has failed to present

evidence sufficient to support a claim of racial harassment even under Title VII.

It is established that the applicable statute of limitations for a claim for relief under 42 U.S.C. § 1981 is controlled by state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Section 1981 actions arising in North Carolina come under the provisions of North Carolina General Statute § 1-52 which sets forth a three year statute of limitations. *Lattimore v. Lowes Theatres, Inc.*, 410 F.Supp. 1397 (M.D.N.C. 1975); *Broadnax v. Burlington Industries, Inc.*, 7 FEP cases, 252 (M.D.N.C. 1972). Therefore, the only claims which are actionable under § 1981 are those claims which fall within the three years preceeding the filing of the complaint on January 25, 1984.

The record reflects only two allegations of racial remarks. At the time of Petitioner's initial interview in 1972, Respondent's President allegedly informed her that she would be working only with white women. The only other statement which Petitioner testified was a racial remark was the statement allegedly attributed to Respondent's President that—"b'locks were slower than whites by nature." Likewise, by her own admission, this alleged racial comment was made in 1976, well outside the applicable period of limitations.²³ Petitioner also testified that she received personal criticism during staff meetings, that she was given an excessive work load, that she was required to dust and sweep, and that the Respondent's President stared at her. This was the substance of her evidence in support of her claim for racial harassment.

Following this evidence, the trial court heard oral argument with regard to whether or not the Petitioner

²³TR 1-19, TR 1-88 (Although these alleged instances are far outside the applicable three year statute of limitations, the district court allowed the testimony as background and to support the element of intent required in a § 1981 case. However, they are not independently cognizable under Title VII or § 1981 because of the statute of limitations bar. See, e.g., *Lattimore v. Lowes Theatres, Inc.*, 410 F.Supp. 1397 (M.D.N.C. 1975); *Broadnax v. Burlington Industries, Inc.*, 7 FEP cases, 252 (M.D.N.C. 1972).

had established a *prima facie* case of racial harassment occurring within the three year period of limitations.²⁴ The trial court expressed the opinion that the Petitioner had not yet made a *prima facie* case of harassment²⁵ but allowed the Petitioner to continue her presentation of evidence to facilitate an out of state witness, with the warning that "when all the evidence is in, I'll just have to make a ruling and straighten it out with the jury if it is allowed to go to the jury."²⁶ Petitioner produced no further evidence of personal racial harassment and the court's opinion at this point was tantamount to the dismissal of her claim on the basis of insufficient evidence. The formal ruling of dismissal followed Respondent's Motion under Rule 50 at the end of the Petitioner's evidence.

In later oral argument, the trial court expressed its opinion to counsel for the Petitioner that "[y]ou're very weak on your question of harassment other than characterization of counsel and the witnesses."²⁷ The court stated that at this point in the trial, the Petitioner's evidence supported only two hostile, discrete acts, one failure to promote and the termination.²⁸ Finally, at the Respondent's motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure at the end of the Petitioner's evidence, the trial court ruled:²⁹

... [i]f the jury finds a history of racial harassment which culminated in failure to promote and discharge of the Plaintiff, they can take that into consideration. But it is not a separate claim under Title—under Section 1981, in my opinion, *in the context of this case*.

It is clear from the judge's ruling that even if a claim for racial harassment or racial mistreatment were cognizable under § 1981 that "in the context of this case," the

²⁴TR 1-66 to 1-80

²⁵TR 1-77

²⁶TR 1-79

²⁷TR 2-152

²⁸TR 2-153

²⁹TR 3-75

Petitioner had failed to present a *prima facie* case of harassment.

The Eleventh Circuit in *Henson v. City of Dundee*, 682 F.2d 807 (11th Cir. 1982) has recognized that:

[T]he 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. For [] harassment to state a claim under Title VII, it must be *sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment*.

682 F.2d at 904 (citing *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234, 238 (5th Cir. 1971) *cert. denied*, 406 U.S. 957, (1972)).

All of the alleged racial slurs clearly occurred outside the statute of limitations applicable to a § 1981 claim and Petitioner's remaining allegations that Respondent's president stared at her, criticized her in meetings and gave her an inordinate amount of work fall far short of conditions "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."

Even if these alleged incidents of harassment were sufficient to support a *prima facie* case, Respondent's proffered explanations of justifiable employee supervision and observation,³⁰ Petitioner's long history of slow work performance³¹, and legitimate review and critique of employee performance at staff meetings³² more than overcame Petitioner's initial burden. Petitioner offered no rebuttal to Respondent's proffered explanations nor did she offer any evidence that such explanations were merely pretextual. See, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Lastly, there is no evidence that Petitioner ever complained about any of the circumstances she now contends

³⁰TR 3-109 to 3-110

³¹See, n.7, *supra*.

³²TR 3-110 to 3-111.

embrace racial harassment. Neither did Petitioner pursue her claim of constructive discharge. Certainly, a working environment heavily charged with discrimination may constitute an unlawful practice under Title VII. *Rogers v. Equal Employment Opportunity Comm'n.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). However, Petitioner's allegations are insufficient to support such a claim under Title VII or under § 1981 if this Court finds such a claim is cognizable.

II.

PETITIONER HAS NOT SUSTAINED A CLAIM FOR PROMOTION DISCRIMINATION UNDER § 1981

A. Petitioner Has Failed To Present Sufficient Evidence To Support A Prima Facie Claim Of Promotion Discrimination Under § 1981

The Petitioner contends that because of racial discrimination, she was denied a job advancement received by Susan Williamson from Account Junior to Account Intermediate.¹³ At the time of this advancement by Mrs. Williamson within the accounting section, Petitioner was a file clerk.¹⁴

To make a *prima facie* case, the Plaintiff must establish the four familiar elements required by *McDonnell-Douglas*:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; (v) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

Additionally, a claim under § 1981 can be sustained only with the proof of intentional purposeful discrimination. *General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

¹³TR 1-46 to 1-48

¹⁴TR 1-99

Petitioner's proof does not establish a *prima facie* claim and therefore should have been dismissed without submission of the issue to the jury.¹⁵ Petitioner could not prove that the employer was seeking applicants for the position of Account Intermediate nor that she applied for or was qualified for such a position. In fact, the only element under the *McDonnell-Douglas* proof scheme which Petitioner could prove in support of her *prima facie* case was that she was a member of a racial minority.

The facts of this case do not present a traditional or classic promotion discrimination claim. There was no job opening for which notices were posted or application solicited. There were no new jobs on the nine person clerical staff. Here, the evidence was clear and uncontradicted that there were no job vacancies, that Ms. Williamson received only a title change and raise, and that Ms. Williamson did not change job functions or responsibilities or even the place where she worked. Further, she continued to be supervised by the same supervisor, and the "promotion" was merely a reflection of her satisfactory performance in order to allow her to move to a higher job title.¹⁶ During this period of time, the Petitioner worked as a filing clerk and was not performing any accounting functions.

¹⁵The test on directing a verdict under Rule 50 is not whether there is any evidence, but whether "there are no controverted issues of fact upon which reasonable men could differ." SA Moore's Federal Practice (2d Ed. 1971), § 50.02[1]; *Brady v. Southern Railroad Company*, 320 U.S. 476, 479-480 (1943); *Pinehurst, Inc. v. Schlarnowitz*, 351 F.2d 509, 513 (4th Cir. 1965); *Pogue v. Retail Credit Company*, 453 F.2d 336 (4th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

¹⁶The Federal Courts are generally committed to a rejection of the so-called 'scintilla rule,' by which a Court might not direct a verdict so long as there is any evidence in support of the proposition tendered by the party against whom the motion is direct." SA Moore's Federal Practice (2d Ed. 1971), § 50.02[1]; *Boeing Company v. Shipman*, 411 F.2d 365, 372, 373 (5th Cir. 1969); *Beatty Shopping Center, Inc. v. Monarch Insurance Company*, 315 F.2d 467 (4th Cir. 1963).

¹⁷TR 4-26 to 4-28

Under no imaginative argument could this advancement or "promotion" of Mrs. Williamson be described as a "job opening for which the employer was seeking applicants". However, once the plaintiff had made a claim that she was entitled to this position (for the first time some three years following the promotion); the Respondent, is forced by a strict application of the *McDonnell-Douglas* proof scheme to articulate some non-discriminatory reason for its actions.

In this situation, an employer should not be forced to explain every promotion or advancement decision simply because a disgruntled employee has retrospectively made a self-serving determination and allegation that she was entitled to such advancement. The method of proof was "never intended to be rigid, mechanized, or ritualistic." *Purco Construction Corp. v. Waters*, 438 U.S. 467, 477 (1978). "The facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from [the Plaintiff] is not necessarily applicable in every respect to differing factual situations." *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, n.13 (1973). To have considered or given the advancement received by Mrs. Williamson to the Petitioner would have forced the employer to supplant Mrs. Williamson from the job that she had been performing in an exceptional manner.

The Petitioner has submitted no evidence that would support the necessary determination that the decision to advance Mrs. Patterson was based upon an intent to racially discriminate against the Petitioner and that race was a motivating factor in denying such an advancement to the Petitioner.

It is obvious from the record that Ms. Williamson was qualified for the position for she continued the same job responsibilities she had been previously performing satisfactorily. (Williamson had college level calculus, accounting and business finance and eight years experience in the accounting area.) Likewise, it is blatantly obvious from the record that the Petitioner was absolutely unqualified for the position. (Petitioner was able to correctly answer

only one of fifteen arithmetic questions on her application. She made numerous errors on the teller line. She lacked the knowledge to work in other areas of the office. Petitioner disliked teller work which required less mathematic skill and aptitude than the accounting job).

The employer has the right to fix the qualifications that are "necessary or preferred" in selecting the employee for promotion, and, in order to make out a *prima facie* case, a plaintiff must establish that she meets these qualifications. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 671 (4th Cir. 1983) *rev'd on other grounds sub nom Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). The cold, hard reality of the facts presented and the only reasonable inference which any reasonable person could draw is that there was no "promotion" for which there was a vacancy and the Petitioner produced not even a scintilla of evidence that she qualified for the position of Account Intermediate. Therefore, this claim should have been dismissed prior to submission to the jury.

However, as is often the case, the court submitted the issue to the jury for its consideration. Obviously, in the event of a verdict adverse to the employer, the trial judge would have had the opportunity to re-consider the *prima facie* proof at the Respondent's motion for a judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. Once the jury returned a verdict in favor of the Respondent, this was not necessary.³⁷

³⁷The Fourth Circuit has recognized the propriety of granting a directed verdict or judgment n.o.v. for the Employer-Defendant in a discrimination-jury case. *Lovelace v. Sherwin Williams Company*, 681 F.2d 230 (4th Cir. 1982).

The court outlined a general procedural doctrine to determine the sufficiency of the evidence required in a jury trial to survive defendant's challenge by motion for a directed verdict:

"(a) The first question is whether Plaintiff's evidence may have carried the original production burden without need

(Continued on following page)

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to invoke the McDonnell Douglas presumption . . . If . . . the plaintiff's evidence fails even to support the unadmitted predicates of the presumption so that it may not be invoked to carry this original burden, inquiries similarly end and the motion can be granted. (b) If the plaintiff's evidence supports the predicates of the presumption without regard to any additional probative force the evidence may have, inquiry must then proceed to whether the defendant has carried the production burden of rebutting the presumption by 'admissible evidence' that is 'legally sufficient' as justification. See, *Burdine*, 450 U.S. at 255, 258, 101 S.Ct. at 1094, 1096; *Loeb*, 600 F.2d at 1016 & n.16 (c) If the defendant's evidence fails to carry this burden, inquiry ceases . . . if on the other hand, the Defendant's evidence carries this burden so that the presumption's force is dispelled, inquiry must proceed to the plaintiff's re-acquired production burden. (d) This burden relates against to the motivational issue but now as re-cast by the defendant's proffered explanation into the more specific form whether as between the plaintiff's [race] and the defendant's proffered reason, [race] is the 'more likely.' In assessing whether this re-cast burden of production has been carried, the Court may properly consider plaintiff's evidence offered to establish the dispelled presumption along with any design to show defendant's proffered explanation to be a pretextual one. If the burden is carried, the case is for the jury under proper instructions defining the motivational issue as ultimately framed at the 'new level of specificity' created by the defendant's rebutting evidence. If this ultimate burden is not carried, the defendant's motion should, of course, be granted, even though the plaintiff's original burden of production was carried by force of the presumption."

Id. at 240-41 (1982). The Court acknowledged that it was "a very close question" as to whether or not the plaintiff had met his initial burden of proof and established a *prima facie* case. However, for the purpose of the appeal, the court assumed that the plaintiff had met its burden and directed its attention to whether the defendant-employer carried its burden to dispel the mandatory presumption:

"The question here is simply whether the defendant has 'introduced . . . admissible evidence' of a 'legitimate non-discriminatory reason' that is 'legally sufficient to justify a judgment for the defendant.' *Burdine*, 450 U.S. at 254-55, 256-56, 101 S.Ct. at 1095-1096. There is no doubt that this relatively modest burden was carried. . . . At this point,

(Continued on following page)

The promotion of Susan Williamson from Account Junior to Account Intermediate is comparable to the promotion of an associate lawyer in a law firm to partnership. The Petitioner's claim that she was entitled to the position of Account Intermediate is equivalent to the claim of a minority paralegal in such a firm that she should be granted the position of partner, rather than the associate attorney. Both claims are significantly absurd in that they establish no *prima facie* cause of action for discriminatory employment practices, whether or not the decision maker may have exhibited prior racial bias.

B. Under The Facts Of This Case, The Jury Instruction Was Correct.

The Defendant Court instructed the jury that in order for the Petitioner to prevail upon the issue of promotion discrimination, it was necessary that she prove that she was more qualified to receive the promotion than the person receiving such promotion and that under § 1981 she must show intentional discrimination.³⁸ Petitioner incorrectly contends that the district court erred by looking at the wrong question.³⁹ But in fact, the district court succinctly charged the jury as follows:

(Continued from previous page)

in the assessment, the probative force of the [plaintiff's] presumption had been completely dispelled.

Id. at 244. The court looked further at the plaintiff's new production burden as whether the circumstantial evidence supports as a reasonable probability the inference that but for claimant's [age] he would not have been demoted." *Lovelace*, at 244.

The court concluded that:

"When, as is proper, the unrefuted basic facts underlying the employer's proffered explanation of the [failure to promote or layoff] are taken into account in assessing the reasonableness of the necessary inference, . . . the district court [may] properly [grant a directed verdict] or judgment n.o.v."

Lovelace at 246.

³⁸JA 40-42

³⁹Brief for Petitioner at p.64.

"You should consider *all the evidence, direct and circumstantial*, to determine whether Plaintiff was not promoted because of her race or because of the reasons given by the Defendant. In making this determination, you should keep in mind that *the ultimate factual question for you to answer is whether the Plaintiff was the victim of an unfavorable employment decision because of the Defendant's intentional discrimination against her because of her race.*"

JA p. 42 (emphasis added).

Learned counsel for the Petitioner has submitted a well reasoned and compelling legal argument with regard to the various ways in which a plaintiff might prevail:

Where the employer articulates the selectee's alleged superior qualifications as the reason for its decision, the Plaintiff may still prevail without proving that her own qualifications are superior. In that situation, the plaintiff may prevail *either* by showing that her own qualifications are superior *or* by convincing the fact finder that the employer did not actually rely on a comparison of the candidates qualifications in making its decision.

Brief for Petitioner at p.65. This Court has determined that an "employer has discretion to choose among equally qualified candidates provided that the decision is not based upon unlawful criteria." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Stated another way, if the employer has the discretion to choose between equally qualified candidates, *and there is no evidence of unlawful criteria*, then surely it is incumbent upon a Plaintiff to show that she is "more qualified" in order to prevail, where she has offered no other evidence of pretext.

Because of the unique factual situation represented in this case where there were no job openings or vacancies and the alleged incident of promotion discrimination involved merely a title change rather than a change in job functions or responsibilities, Respondent could articulate

no more obvious reason for its decision than the qualifications of Mrs. Williamson.

With regard to this specific employment decision, the Petitioner was unable to present *any* evidence which would support a finding that the employer did not actually rely on a comparison of the candidates qualifications in making its decision. Therefore, by Petitioner's own reasoning, she can prevail only by showing that her qualifications are superior. This is precisely the result which the trial court reached and the obvious basis upon which the trial court charged the jury.

The Petitioner was granted every opportunity to present evidence to support her contention that this employment decision was based upon "unlawful criteria." However, with regard to this employment decision, no competent evidence was submitted. Certainly, discriminatory intent may be proved in a variety of methods as Petitioner contends. However, under the unique facts of this case, the Fourth Circuit properly upheld the lower court's charge regarding "superior qualifications." In effect, the trial court found no "unlawful criteria" as a matter of law and submitted, the case to the jury for a factual determination of relative qualifications. Petitioner consistently maintained at trial that any deficiency in qualifications were the result of discriminatory training opportunities and the judge charged the jury accordingly allowing the jury to factually determine the issue of inadequate training and its impact on qualifications. JA 41.

The familiar proof scheme applicable to cases of racial discrimination was first articulated in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The initial burden of proof to establish a *prima facie* case of racial discrimination is on the Plaintiff. Once the claimant has established a *prima facie* case, the burden of production is on the defendant to articulate a non-discriminatory motive for the employment decisions. The burden of proof is then on the plaintiff to show that the reasons proffered by the defendant were in fact pretextual.

Once the trial court allowed this case to go beyond the *prima facie* stage, the employer was compelled to articulate a non-discriminatory reason for advancing Mrs. Williamson to Account Intermediate. The very simple explanation for such a decision was Mrs. Williamson's quality of performance in undertaking her job responsibilities. Within the context of established case law, this proffered explanation most closely translated as a decision based on superior qualifications.

The trial court then relied on established Fourth Circuit cases which state:

The rule in this Circuit is that where relative qualifications are advanced as the non-discriminatory reason for an employment decision, the plaintiff has the burden of establishing that she was better qualified than the successful applicant. *Anderson v. City of Bessemer*, 717 F.2d 149, 153 (4th Cir. 1983), [rev'd on other grounds, 470 U.S. 564 (1985)]; *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983) [rev'd on other grounds sub nom. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984).]

Young v. Lehman, 748 F.2d 194 (4th Cir. 1984). This Fourth Circuit rule is not inconsistent with the decision of this Court that "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

Petitioner has confused the various elements necessary to support her claim of promotion discrimination. To carry her burden and sustain a claim under § 1981, a Plaintiff must always show intentional discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 391 (1982). However, in addition to a showing of intent, under the three stage method of proof established in *McDonnell-Douglas*, once the employer has shown that its decision was based on a "legitimate non-discriminatory reason," *Burdine*, 450 U.S. at 254, the "factual inquiry proceeds to a

new level of specificity." *Burdine*, 450 U.S. at 255. Where, as in this case, the employer has proffered superior qualifications as the non-discriminatory reason for its employment decision, Petitioner's burden is to demonstrate "pretext." Petitioner's burden is to show that the "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Petitioner states that "there are at least three ways through which the Petitioner can meet her burden of discrediting the proffered explanation" other than proof of her superior qualifications: (1) by showing her qualifications are equal; (2) by showing that the employer did not rely on qualifications in making its decision; and (3) by showing that the reason given by the employer is not credible.⁴⁰

Assuming *arguendo* that Petitioner's analysis is correct, it is logical that where a Plaintiff has not shown that her qualifications are equal or, has not shown that the employer did not rely on qualifications or has not shown that the employer's proffered reason lacks credibility, then the only alternative remaining way to show pretext is that of superior qualifications. Petitioner offered no evidence in rebuttal to the simple non-discriminatory explanation for the advancement of Mrs. Williamson to Account Intermediate. Therefore, where the Petitioner has offered no legally sufficient evidence to sustain a finding of one of the "other ways" to show pretext, the court was correct in instructing the jury that she must show superior qualifications in order to establish pretext. Even under Petitioner's own analysis this was a proper instruction.

The Petitioner implies that the district court judge instructed the jury that the Plaintiff must show that she was better qualified than the person who received the promotion in order to make a *prima facie* case.⁴¹ In fact, the trial judge outside the hearing of the jury, stated to counsel that "the law in the Fourth Circuit seems to be that

⁴⁰Brief for Petitioner at p. 82.

⁴¹Brief for Petitioner at pp. 88-91.

in order to make out a *prima facie* case, you must show that you are better qualified than the person who received the promotion.⁴²

Although Petitioner has seized on this statement by the court as an apparent misstatement of the law, such comments by the court are not pertinent because they were made outside the hearing of the jury and because once such a case has been fully tried on the merits, the question of whether the plaintiff has established a *prima facie* case is no longer relevant. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983); *Mitchell v. Baldrige*, 759 F.2d 80 (D.C.Cir. 1985).

Respondent contends that Petitioner need establish only that she was qualified, not that she was more qualified than Mrs. Williamson, in addition to the other elements necessary, to prove her *prima facie* case. However, under the facts of this case, Petitioner must show superior qualifications after a showing by the employer that qualifications were the basis for its decision.

With regard to Petitioner's claim of promotion discrimination, she has offered no competent evidence of unlawful criteria legally sufficient to rebut the proffered explanation that Mrs. Williamson received a title advancement based upon her qualifications and performance.

— 9 —

CONCLUSION

For the reasons stated, the decision of the Fourth Circuit Court of Appeals should be affirmed as to all issues.

Respectfully submitted,

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No. 87-107

Supreme Court, U.S.

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JOSEPH P. SPENCER, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals for the Fourth Circuit

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No. 87-107

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

MCLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Petitioner believes that its initial brief fairly states the evidence. Because the district court's legal ruling and the erroneous jury instruction prevented the jury from deciding the facts, petitioner's version of disputed facts must be accepted for the purpose of

deciding the legal questions presented. Petitioner will briefly respond to a few of respondent's alleged factual misstatements.

Respondent asserts that petitioner indicated that she did not want to do teller work. Brief for Respondent at 4. In fact, because Patterson had so much filing work, the teller work that she was assigned exacerbated the pressure on her. TR 2-108, 3-103. In this context, Patterson indicated that the part-time teller work, on top of her other responsibilities, was too much of a burden. TR 2-108.

Respondent states that Stevenson stared at Mrs. Patterson "from as much as forty feet away." Brief for Respondent at 6. The record shows that Stevenson's staring and close scrutiny of Patterson frequently occurred from five to ten feet away and on some occasions from much

closer. TR at 1-38, 1-90, 2-86 & 2-87.

Respondent asserts that Patterson was not qualified for the bookkeeping job because she answered only four of fifteen math questions on a pre-employment test. Respondent fails to note that this was a Wonderlic personnel test for which there was no evidence of validity or job-relatedness.¹

Respondent asserts that petitioner "misleads the Court" by asserting that she was never able to find out about promotion opportunities and that white workers with less education and seniority were promoted over her. Brief for Respondent at 6. Patterson introduced evidence of respondent's hiring of four

¹ The fifteen math questions were scattered among fifty questions and Patterson had only twelve minutes to complete the entire test. She was instructed not to "skip about" in answering the questions and the cover sheet stated: "[i]t is unlikely that you will finish all of [the 50 questions]." Record, Vol. VII, Defendant Ex. 21.

white workers into accounting or secretarial positions, while failing to consider Patterson for promotion to these positions. See TR at 1-92 to 1-97.

Respondent asserts that merit increases were denied to white employees at the same time that Patterson was denied an increase. Brief for Respondent at 7. However, of the two white employees who did not receive an increase, one had been on maternity leave for a substantial part of the year. TR 3-108, 3-150, 3-152. The district court refused to admit evidence of a possible violation of the Pregnancy Disability Act. TR 3-152.

Respondent correctly asserts that Patterson expressed interest in accounting and secretarial positions to Mr. Steer, the person who first interviewed her for the job, rather than

to Mr. Stevenson. Brief for Respondent at 3-3. However, it is clear that Steer was acting as an agent for McLean Credit Union at the time. The Credit Union was closely associated with McLean Trucking Company and the Trucking Company performed most of the personnel functions for the Credit Union. TR 1-14 to 1-18, 3-79 to 3-81, 3-132 to 3-133, 3-135 to 3-138, 3-140 to 3-141. Thus, applicants for employment at the Credit Union filled out Trucking Company applications and were interviewed and screened by the Trucking Company personnel office. TR 3-81, 3-133 to 3-135.

Respondent asserts that petitioner's statement about discrimination in filling secretarial positions is a "gross misstatement of the testimony" because "[t]he uncontradicted evidence was that no blacks ever applied for a secretarial position." Brief for Respondent at 7.

This is not true. As an example, Brenda Patterson, who had previously worked as a secretary, TR 1-12 to 1-14, applied for "any position" for which she was qualified. Record, Vol. VII, Defendant Ex. 10, page 1.³

ARGUMENT

I.

THE COURT SHOULD REJECT THE NOVEL LIMITATION PROPOSED BY THE SOLICITOR GENERAL

The Solicitor General⁴ offers a

³ In the testimony on which respondent relies as "uncontradicted evidence", Stevenson testified that he did not know of any black applicants for secretarial positions. TR 4-12. However, Stevenson was in no position to know the race of all of the applicants, since the Trucking Company screened the applicants and referred only some of them to the Credit Union. *Id.*

⁴ The Equal Employment Opportunity Commission, the federal agency with primary responsibility for enforcing employment discrimination laws, is not on the Solicitor General's brief and is not mentioned in the statement of interest. Compare, *E.E.O.C.* Brief for the United States as Amicus Curiae at 1, Watson v. Fort Worth Bank & Trust, No. 86-6139 (argued January 20, 1988).

novel limitation on section 1981's coverage. Although the Solicitor General's theory at first glance may seem more expansive than the Fourth Circuit's rule, the protection offered by the Solicitor General is largely illusory.

As it applies to discriminatory working conditions, the Solicitor General's theory has two prongs. First, the Solicitor General correctly concludes that "an employer violates Section 1981 when it intentionally assumes different contractual obligations with respect to black persons than to white persons." Brief for United States, at 11. See also *id.* at 17 n.8. Thus, an employer which uses two different form contracts, providing white employees with appropriate working conditions and similarly-situated black employees with menial tasks, excessive work and undue scrutiny, would be liable under section

1981. This different treatment of white and black employees is actionable under section 1981 even where the contractually-explicit discriminatory working conditions are not as egregious as to constitute a constructive discharge or to violate any state law. See Brief for United States at 11.

Petitioner agrees with the Solicitor General that contractually-explicit discrimination in working conditions violates section 1981. This conclusion theoretically expands upon the Fourth Circuit's ruling that only discrimination in hiring, firing and promotion is covered. However, in practical effect this prong of the Solicitor General's theory will provide little, if any, additional protection. Virtually all employers are now sophisticated enough not to write racial harassment, race-based workloads or race-based level of

scrutiny explicitly into their employment contracts.

The second prong of the Solicitor General's theory suggests an unprecedented limitation on section 1981's coverage. The Solicitor General asserts that where the employer does not write down (or state at the outset) that it intends to practice racial discrimination in the conditions of employment, such discrimination is actionable under section 1981 only if the employer has agreed (either explicitly or implicitly) to provide a non-discriminatory working environment. The Solicitor General thus invokes a breach of contract theory to define the coverage of section 1981.

Except for some collective bargaining agreements, it is unlikely that many employers will explicitly contract to provide a non-discriminatory

working environment. And the implicit duty of good faith dealing under state laws that the Solicitor General reads into employment contracts appears to be so narrow that it would cover only the most egregious conduct that would give rise to a cause of action for constructive discharge. See Brief for United States at 18-19.⁵ Even under the Fourth Circuit's restrictive interpretation, section 1981 covers "firing," which presumably includes constructive discharge. Thus, this prong of the Solicitor General's theory would provide no real additional protection.

⁵ Several courts have held that a constructive discharge occurs only when the working conditions are so intolerable that the employee is forced to quit. E.g., Young v. National Center for Health Services Research, 828 F.2d 235, 238 (4th Cir. 1987); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Muller v. U.S. Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975).

It is difficult to discern why the Solicitor General concludes that discriminatory treatment of black employees arising out of policy or practice should be excluded from section 1981's coverage, while such discriminatory treatment written into the contract is covered. Petitioner can only speculate that the Solicitor General adopts an extremely literal reading of section 1981's language guaranteeing black persons the "same right ... to make ... contracts." If the discriminatory treatment is in the contract, then it is obvious that the black employee has not been afforded the "same" contract. If, however, the discriminatory treatment arises in practice, then the black employee technically has been provided with the "same" contract, and the Solicitor General apparently views the discriminatory working conditions as

unrelated to this contract.

This overly literal reading of section 1981 has several problems. This theory converts section 1981 from a remedy for refusals to provide blacks with equal contractual opportunities to a remedy for breach of contract in those rare situations where the black worker is able to obtain a contract that requires non-discriminatory working conditions. Section 1981 is a federal anti-discrimination statute, designed to provide equal contractual opportunities, not a breach of contract remedy. Incorporation of state laws to determine the scope of substantive protections under section 1981 is at odds with the legislative purpose. The extensive legislative history, detailed in petitioner's initial brief, pp. 46-55, shows that one purpose of section 1981 was to pre-empt a large body of state

laws collectively known as Black Codes. There is no indication that Congress intended to incorporate the varied and inconsistent state laws to determine substantive liability under section 1981.

Liability under section 1981 should not turn on whether the employer explicitly writes down the discriminatory conditions in the employment contract. The denial of the full benefit of the contract occurs regardless of whether the discriminatory treatment is explicitly included in the contract or is simply practiced by the employer.

In addition, the desirable working conditions provided to white workers and the discriminatory working conditions provided to black workers are not separate and independent from the contract of employment. Even if working conditions are not in the contract, they

are related to it.⁶ Subjecting black workers to discriminatory working conditions is analytically the same as the award of a year-end bonus to white but not to black employees. The bonus is not a contractual right for either the white or the black worker, but it nonetheless results from the employment pursuant to the contract.⁷

⁶ The Court's decision in Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), makes clear that a benefit that is related to the holding of property is covered by section 1982, even where there is no property right to the benefit. The black plaintiff in Tillman had purchased a home close to a private swimming club which voluntarily provided membership preferences to homeowners in the neighborhood. Nothing in the black homeowner's purchase agreement or deed gave him a right to preference for club membership. Nonetheless, the Court held that the club's discriminatory membership policy "abridged and diluted" the black homeowner's "right to acquire a home." 410 U.S. at 437.

⁷ A bonus that results from employment is treated as taxable salary, and not as a gift, under federal income

Furthermore, section 1981 prohibits racially discriminatory conduct, whether by the employer or a third person, that discourages or interferes with the right to obtain equal contractual opportunities. Obviously, an employer's discriminatory treatment of black employees will discourage such workers from applying for and accepting employment with that employer. In this case, when Brenda Patterson complained about her working conditions, she was told "that I could always leave." TR 1-48. Such discrimination in the conditions of employment is no different from a Ku Klux Klan cross burning in the front yard of a worker, as a message that the worker should not apply for, accept, or continue to hold, a particular job. The Court has made clear that conduct on

tax law. I.R.C. § 102(c)(1). See also Rabkin & Johnson, Federal Income, Gift and Estate Taxation § 14.08[3] (1987).

the basis of race discouraging an employee from continuing her employment violates section 1981 regardless of whether the employee actually resigns.⁸

The theory advanced by the Solicitor General is inconsistent with the Court's prior decisions. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, (1975), applied section 1981 to discrimination in job assignments. There is no suggestion in that opinion that this discrimination was written into the employment contracts, and thus covered by

⁸ The Court concluded that where "a group of white men had terrorized several Negroes to prevent them from working in a sawmill ... there was no doubt that [the whites] had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract," in violation of section 1981. Jones v. Mayer Co., 392 U.S. 409, 441-42, n.78 (1968) (overruling Hodges v. United States, 203 U.S. 1 (1906)). See also Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1008 (S.D. Texas 1981) (KKK threats and intimidation in attempt to cause termination of contract between fishermen and dock owners actionable under § 1981).

the first prong of the Solicitor's theory. Moreover, there is no suggestion that the employer in that case had contracted to make job assignments on a non-discriminatory basis, thus bringing its conduct under the second prong of the Solicitor General's theory. Similarly, Shaare Tefila Congregation v. Cobb, 481 U.S. _____, 107 S.Ct. 2019 (1987), and Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), involved neither discrimination that was written into the deed nor a non-discrimination agreement that had been breached.⁹

⁹ The Solicitor General suggests that the Court's decision in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), supports its theory. The Solicitor General construes McDonald as holding that "the white employees had been denied the specific contractual opportunity made available to the black employee -- continued employment notwithstanding charges of misappropriation of the employer's property." Brief for United States at 12. However, the opportunity to remain employed notwithstanding charges of misappropriation is no more "contractual"

II.

SECTION 1981 PROHIBITS RACIAL DISCRIMINATION IN THE TERMS AND CONDITIONS OF EMPLOYMENT

A. Section 1981 Is Not Limited to Protection Against Absolute Denial of "Economic Rights"

Respondent's major argument is that section 1981 "was passed to protect property and economic rights." Brief for Respondent at 21.¹⁰ Respondent contends

than the opportunity to remain employed under non-discriminatory working conditions. This opportunity was not a part of either the black or the white employees' contract. It was a benefit, voluntarily conferred by the employer. Nonetheless, the Court concluded that the discriminatory provision of this benefit would violate section 1981.

¹⁰ Respondent also argues that section 1981 "is addressed solely to legal capacity to contract." *Id.* at 25. The argument that section 1981 extends only to legal rules which deny minorities the capacity to make or enforce contracts was rejected in *Burnson v. McCrory*, 427 U.S. 140 (1974). Respondent quotes extensively from the concurring and dissenting opinions in that case, apparently in the hope that the Court will reconsider and overrule *Burnson*. See Brief for Respondent at 19-20, 25-26. Petitioner believes that *Burnson* and *Jones v. Mayer Co.*, 392 U.S. 409 (1968), were

that economic rights encompass only "the right to enter into a contract and bind the other party to it." *Id.*

In attempting to limit section 1981 to so-called "economic rights" -- defined to exclude discrimination in the terms

correctly decided. The various opinions in those cases thoroughly analyze whether section 1 of the 1866 Civil Rights Act provides a cause of action for private discrimination, and petitioner has nothing to add to that debate.

In any event, *Jones* and *Burnson* settled the debate and there is no reason for the Court to revisit the issues resolved in those decisions. As stated by Justice Stevens in his concurring opinion in *Burnson*: "Jones has been decided and is now an important part of the fabric of our law. ... For the Court now to overrule Jones would be ... so clearly contrary to ... the norms of today that I think the Court is entirely correct in adhering to Jones." 427 U.S. at 190, 191-192. Members of the Court who dissented in *Jones* and *Burnson* have in recent years indicated acceptance of those decisions. For example, last Term the Court unanimously reaffirmed that section 1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts." *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S. Ct. 2022, 2026 (1987).

and conditions of employment-- respondent ignores the extensive legislative history establishing that Congress was most concerned with discriminatory treatment of black workers who entered into contracts of employment with former slave owners. This clear expression of legislative intent alone mandates rejection of respondent's narrow interpretation of section 1981.

The authorities cited by respondent do not support its "economic rights" limitation. The "economic rights" theory is derived from language in the dissenting opinion in Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S.Ct. 2617, 2628 (1987) (Brennan, J., joined by Marshall & Blackmun, JJ.). See Brief for Respondent at 23. Yet, the Court in Goodman rejected the notion that section 1981 protects only economic rights. The Court held that the guarantee to make and

enforce contracts "is ... part of the federal law barring racial discrimination, which ... is a fundamental injury to the individual rights of the person." 107 S.Ct. at 2621. Moreover, the dissenting opinion on which respondent relies concluded that section 1981 prohibits employers from "provid[ing] [to minorities] a lesser opportunity [to contract] than others, in the form of less favorable contract terms or unequal treatment discouraging entry into contractual relations." 107 S.Ct. at 2627 n.4.

Respondent appears to concede that the Court's prior decisions do not support the result that it advocates, asserting that those decisions "have added to the difficulty" in discerning the scope of section 1981. Brief for Respondent at 28. As set out in detail in petitioner's initial brief, the

Court's prior decisions make clear that racial discrimination in the terms and conditions of employment is prohibited by section 1981.¹¹

¹¹ Respondent attempts to limit Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), by asserting that the coverage of seniority and job assignments in that case "is not inconsistent with the idea that § 1981 was passed to protect property and economic rights and does not address interpersonal relationships." Brief for Respondent at 21. The alleged discrimination in the Johnson case is no different from the discrimination against petitioner in the instant case. In Johnson, the plaintiff alleged that the employer "assigns, reassigns, promotes, and otherwise acts or fails to act" in a discriminatory manner. Appendix at 6a (Complaint ¶ V(2)). Johnson v. Railway Express. The EEOC Final Investigative Report, attached to the Complaint in Johnson, described a variety of allegations, including racial harassment of Willie Johnson, "more severe" work orders and discipline for black employees and "dual standards, based on race, for conditions of employment and disciplinary action." *Id.* at 22a, 36a. The Brief for Petitioner in Johnson opened with the statement: "Petitioner, Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment." Brief for Petitioner at 2 (emphasis added). In this context, the Court in Johnson

The lower court cases cited by respondent also do not support its "economic rights" theory. Respondent cites only two lower court cases that are on point. Williams v. Atchison, Topeka & Santa Fe Ry., 627 F. Supp. 752 (W.D. Mo. 1986); Minority Police Officers Association v. City of South Bend, 617 F. Supp. 1330 (W.D. Ind. 1985), *aff'd*, 801 F.2d 964 (7th Cir. 1986). These two

specifically held "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 459-460.

In both Johnson and the instant case, the claim involves the treatment of the employee "after the contract is in effect" and is inconsistent with respondent's position that section 1981 prohibits only conduct that absolutely prevents entry into the contract. *See* Brief for Respondent at 22. In addition, a major part of petitioner's claim in this case involves her job assignments, such as dusting and sweeping the office and excessive work. It is difficult to understand why the job assignment issue in Johnson is deemed to affect economic rights, while petitioner's job assignment claim is labelled as affecting only "interpersonal relationships."

district court decisions both conclude in a footnote that section 1981 does not cover discrimination in the terms and conditions of employment. However, neither of these decisions includes any analysis of the issue or cites any authority to support the conclusion. The decisions make no mention of an "economic rights" theory. Each of these district court footnotes contravenes the governing law of the circuit that section 1981 encompasses discrimination in the terms and conditions of employment. See Ransay v. American Air Filter Co., 772 F.2d 1303, 1312 (7th Cir. 1985); Wilmington v. J. I. Case Co., 793 F.2d 909, 916 (8th Cir. 1986); Block v. E. H. Macy & Co., 712 F.2d 1241, 1247 (8th Cir. 1983).¹²

¹² Respondent also cites Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974), as holding "that separate claims for racial harassment are not cognizable under § 1981." Brief for Respondent at 15. In fact, Howard did not address the scope of section 1981's

Respondent relies on four other cases to support its assertion that section 1981 protects only economic rights. See Brief for Respondent at 24-25 and n.17. None of these cases even hints that the scope of section 1981 is limited to so-called economic interests. To the contrary, in one of the cases the Fifth Circuit decided the merits of a section 1981 claim for racial discrimination in working conditions, thus implying that this cause of action is cognizable.¹³

coverage, but held that section 1981 does not authorize the award of compensatory damages. See 372 F. Supp. at 855-58. This conclusion was rejected in Johnson v. Railway Express, 421 U.S. at 459-60.

¹³ Adams v. MacDougal, 695 F.2d 104, 105-107 (5th Cir. 1983). The other three cases cited by respondent are not on point. See Howard v. Security Service, Inc., 516 F. Supp. 508, 513 (D. Md. 1981); Faraca v. Clements, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975); Macklin v. Spector Freight Systems, 478 F.2d 979 (D.C. Cir. 1973). As is true of dozens of other cases, in Howard, Faraca and Macklin, the claimed

Respondent also cites several constructive discharge cases, asserting that such cases "are helpful because they demonstrate that racial harassment is an element necessary in such cases rather than a separate claim for relief." Brief for Respondent at 30-31.¹⁴ In fact, two of these cases support petitioner's position. In Martin v. Citibank, 762

violation was the defendant's refusal to enter into a contract. The fact that cases exist upholding section 1981's coverage of such conduct does not mean that this is the only type of conduct that violates section 1981. In fact, the Court in Faraca recognized that "interference" with the right to contract violates section 1981. 506 F.2d at 958.

¹⁴ Respondent asserts that "the Petitioner's claims alleging constructive discharge were dismissed by the trial judge upon Respondent's motion for summary judgment." Brief for Respondent at 32. This is incorrect. Petitioner, who was laid off, did not assert a constructive discharge claim. See Joint Appendix at 5-16 (Complaint). The district court's ruling denying the defendant's motion for summary judgment did not mention any constructive discharge claim. Record, Vol. I, Tab 13 (Memorandum and Order, filed March 14, 1985).

F.2d 212, 214-215 (2d Cir. 1985), the court entertained on the merits a section 1981 claim of discriminatory working conditions based on the administration of a polygraph test to minority employees. 762 F.2d at 216-220.¹⁵ And in Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974), the Court concluded: "When an employer ... places more stringent requirements on employees because of their race, section 1981 is violated."¹⁶

¹⁵ The working conditions claim was joined with a separate claim of constructive discharge. The court ruled on the merits that the plaintiff had presented insufficient evidence to support the jury verdict of discrimination in working conditions. 762 F.2d at 220.

¹⁶ The three other constructive discharge cases cited by respondent do not address section 1981's coverage of discriminatory working conditions. The plaintiff in Irving v. Dubuque Packing Co., 689 F.2d 170, 171-172 (10th Cir. 1982), framed his allegations as constructive discharge and did not assert a separate claim related to the conditions of employment. In Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981), the plaintiff joined claims under

Respondent also argues that "[generally], ... the cases have not supported an independent claim for racial harassment or hostile work environment under section 1981 separate and apart from claims under Title VII or collateral claims of racially discriminatory promotion and discharge practices under section 1981." Brief for Respondent at 29. To support this argument, respondent offers novel theories to distinguish the numerous court of appeals decisions¹⁷ that have upheld a section 1981 cause of action for discriminatory terms and

both section 1981 and Title VII of discrimination in working conditions and discharge. The court ruled against plaintiff on the merits of all claims without addressing whether the working conditions claim was actionable under section 1981. See 646 F.2d at 1252 n.1. Muller v. U. S. Steel Corp., 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975), held only that discriminatory failure to promote does not alone constitute constructive discharge.

¹⁷ See cases cited in Brief for Petitioner at 35 n.13.

conditions of employment. Brief for Respondent at 30. As set out in the Reply Memorandum for the Petitioner, at 1-16, filed in support of the petition for writ of certiorari, respondent's effort to distinguish these court of appeals decisions fails.

Underlying respondent's argument is the assumption that discrimination in the terms and conditions of employment does not affect the employee's economic interests.¹⁸ This assumption is incorrect. The humiliation and

¹⁸ Respondent's "economic rights" theory ignores the fact that petitioner's claim of salary discrimination was dismissed on the ground that it was not within the scope of section 1981. It is difficult to imagine a claim more related to economic interests than salary discrimination.

degradation suffered by an employee who, because of her race, is assigned menial tasks, is given an oppressive workload, is told that "blacks are slower by nature than whites," and is subjected to undue and unequal scrutiny, clearly discourages the making and enforcing of an employment contract. The economic choice available to an employee who is offered employment under such discriminatory conditions is different from that available to a worker who is offered non-discriminatory terms and conditions. For example, a black employee who has the opportunity to choose between taking or continuing in a job that pays ten dollars per hour with discriminatory, humiliating conditions, or another job at five dollars per hour with non-discriminatory conditions, may well choose the lower paying job in order to avoid the harm inherent in the racially-biased environment. Clearly,

whatever choice she makes, that worker's economic interest has been adversely affected, because she does not have the same economic opportunity as a white worker.

B. Petitioner Presented a Prima Facie Case of Discrimination in the Terms and Conditions of Employment

Respondent argues that petitioner failed to present evidence sufficient to support a claim of racial harassment. This argument was not raised in respondent's brief in the court of appeals or in respondent's brief in opposition to the petition for certiorari, and is not included in the Questions Presented on which the Court granted review. The Court should decline to exercise its discretion to consider this fact-based argument. See Oklahoma City v. Tuttle, 471 U.S. 808, 813-816 (1985).

On the merits, there can be no doubt

that the evidence introduced by petitioner is sufficient to support a claim of discrimination in the terms and conditions of employment. Petitioner introduced evidence of a pattern throughout her employment of an unequal and oppressive workload and of unequal and demeaning scrutiny. In addition, plaintiff presented evidence that she was denied a salary increase that was given to other employees and that respondent gave a false explanation for the denial of this increase to plaintiff.

Contrary to respondent's assertion, the discrimination in the terms and conditions of petitioner's employment did not occur outside the three-year statute of limitations period. At trial, the district court carefully divided the presentation of plaintiff's case into incidents that occurred after January, 1981, and those that occurred before.

Thus, petitioner presented evidence that after January, 1981, she was the only clerical employee required to dust and sweep the office, TR 1-30, 1-31,¹⁹ that her workload was oppressive and much in excess of that given to white clerical workers, TR 1-27 to 1-29, that other employees performed the tasks of white workers while they were on vacation, but when Patterson went on vacation her work just "piled up," TR 1-37, that Stevenson stared at her four to five times a week and made comments about Patterson being "still behind," TR 1-39, 1-38, that this staring and these remarks were not made to white workers, *id.*, that Stevenson criticized Patterson publicly by name in staff meetings while addressing white workers' errors in private counselling sessions, TR 1-39 to 1-40, and that in

¹⁹ Respondent did not deny petitioner's evidence about dusting and sweeping the office.

1982 Stevenson remarked that a black job applicant "could just forget it," TR 1-44 to 1-45. Only after Patterson introduced this evidence of events occurring within the limitations period was she allowed to go back in time and show that these incidents were part of a pattern that started with her pre-employment interview and continued throughout her employment. TR 1-80.20

20 Respondent asserts that the pre-1981 discrimination is not actionable. However, where a pattern of discriminatory conduct by the employer continues into the limitations period, the court may reach back and provide a remedy for conduct that is part of the pattern. E.g. Havana Realty Corp. v. Coleman, 455 U.S. 363, 380-381 (1982) (applying continuing violation doctrine to 180-day filing requirement under Fair Housing Act); Taylor v. Home Insurance Co., 777 F.2d 849, 856 (4th Cir. 1985), cert. denied, 106 S. Ct. 3249 (1986); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982); Jewett v. International Tel. & Tel. Corp., 693 F.2d 89, 91-92 (3rd Cir.), cert. denied, 454 U.S. 969 (1981); Roberts v. North American Rockwell Corp., 650 F.2d 823, 826-828 (6th Cir. 1981); Sale v. ITT Financial Corp., 619 F.2d 738, 743-744 (8th Cir. 1980); Reed v. Lockheed Aircraft Corp., 613 F.2d 757,

Patterson also introduced evidence of several racial remarks made by respondent's President. These remarks are not the type of sporadic comments in "casual conversation" that may not alone be actionable under section 1981 or Title VII. Rather than being isolated, Mr. Stevenson's remarks are directly related to and explanatory of respondent's harsh conduct toward petitioner. Because Stevenson believed that "blacks are ... slower than whites by nature," he persisted in piling work on petitioner

759-760 (9th Cir. 1980); Acha v. Beane, 570 F.2d 57, 65 (3d Cir. 1977). Clearly, the discrimination against Mrs. Patterson in the terms and conditions of her employment, which was a continuing and almost daily pattern, falls within the continuing violation doctrine. The continuing violation doctrine applies to claims under § 1981 as well as Title VII. E.g. Perez v. Laredo Junior College, 706 F.2d 731, 733 (9th Cir. 1983); Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 791 (9th Cir. 1982); Hacklin, 478 F.2d at 994 n.30. But see Kornegay v. Burlington Industries, Inc., 803 F.2d 787 (4th Cir. 1986).

and then criticising her for being "slow." The fact that Stevenson did not make the racial remark every day does not reduce the harm to petitioner, since Stevenson by his actions toward Brenda Patterson reiterated his racial beliefs day after day, year after year.²¹

Patterson also introduced evidence that she suffered substantial injury as a result of respondent's discriminatory conduct:

I was humiliated, I was nervous all the time, I worried, I lost sleep, I'm dreaming about working during the night and completing jobs, I was -- I brought my troubles and my worries home, and I cried constantly, and I was just nervous and I felt downgraded, and I felt like I was just being used by the credit union, and being harassed and humiliated.

²¹ Stevenson also told Patterson that "[a]ll the other white girls can do your jobs faster than you can" and, "after ... he quit saying the blacks and the whites ... he mentioned animals were faster -- that some animals was faster than other animals...." TR 2-83.

TR 1-60.

Respondent also argues that it satisfied its burden of articulating a non-discriminatory explanation for its treatment of petitioner and that petitioner failed to introduce additional evidence of pretext.²² The law is clear that the plaintiff is not required to introduce additional evidence of pretext, but may rely on her case-in-chief and cross-examination of the defendant's witnesses to establish pretext.²³ In this case, the parties introduced conflicting evidence concerning petitioner's workload and respondent's

²² Respondent does not make this argument with respect to petitioner's salary discrimination claim. Respondent also introduced no explanation for assigning petitioner, but not the other clerical workers, to dust and sweep the office.

²³ Coates v. Johnson & Johnson, 756 F.2d 824, 831 n.5 (7th Cir. 1985); Worthy v. United States, 616 F.2d 698, 701 (2d Cir. 1980).

scrutiny of her, and resolution of the conflict would depend largely on the credibility of individual witnesses. For example, if the jury believed the evidence concerning Stevenson's racial remarks and attitudes, it could reasonably have concluded that this racial prejudice, rather than legitimate employer concerns, caused his workload decisions and his criticism and scrutiny of Brenda Patterson.

III.

THE "SUPERIOR QUALIFICATIONS" JURY INSTRUCTION IMPROPERLY DENIED PETITIONER A FULL OPPORTUNITY TO PROVE DISCRIMINATORY INTENT

Respondent apparently does not disagree with petitioner's legal analysis of the many ways to prove discriminatory intent. Instead, respondent argues the facts, asserting that petitioner did not present any of the types of evidence that are probative on the issue of intent. Respondent asks the Court to find that

"under the facts of this case, the jury instruction was correct." Brief for Respondent at 41.

Neither the district court nor the court of appeals suggested that the validity of the "superior qualifications" jury instruction was limited by the facts of this case. And, in view of the evidence presented by petitioner, respondent's suggestion is clearly without merit.

The extensive evidence of the racial prejudice of respondent's President and key decisionmaker, Robert Stevenson, is set out in petitioner's brief and will only be summarized here. The company Vice-President, while testifying as a witness for the defendant, admitted that Stevenson "didn't want to hire any blacks," TR 4-89. A supervisor testified about a 1980 incident in which Stevenson refused to hire a black applicant because

"[w]e don't need any more problems around here." TR 2-161. Mrs. Patterson testified about another incident in which Stevenson refused to take the application of a black worker. TR 1-43 to 1-45. Mrs. Patterson also testified that Stevenson expressed the view that "blacks are known to work slower than whites by nature." TR 1-88. Stevenson told Patterson when she first came to work that the "white women ... probably wouldn't like me because they weren't used to working with blacks." TR 1-19.²⁴

Respondent contends that this evidence is insufficient to permit a jury to infer that the company's asserted

²⁴ Petitioner also established that Stevenson hired no black employee from 1953 to 1972, that the company never had a black supervisor, secretary (the secretaries worked personally for the upper managers) or accounting employee and that the company had only three black employees during Stevenson's thirty-two years tenure. TR 1-29, 3-124, 3-129, 4-12.

reliance on qualifications is pretextual. Apparently, respondent believes that the only sufficient proof of pretext is an admission by the employer that its racial attitudes and policies infected this decision. To the contrary, petitioner's direct evidence, if believed, would shift the burden of proof to the employer. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Clearly, a jury that believed plaintiff's evidence²⁵ could reasonably find that Patterson was not given fair consideration for the promotion because of her race. In fact, on this evidence, if true, it is almost inconceivable that a black employee could have been given non-discriminatory consideration.

²⁵ Since Stevenson denied most of this evidence, a jury that believed plaintiff's evidence might well refuse to find Stevenson credible in any of his testimony. Respondent's defense depended largely on Stevenson's credibility.

Respondent also argues that petitioner did not establish a prima facie case, alleging that Patterson was not qualified for the promotion and that no vacancy existed. The district court ruled that the evidence was sufficient to require submission of these questions to the jury. The Court should exercise its discretion to decline to address these factual questions.

If the Court reaches the merits of the prima facie case argument, respondent's allegations must be considered in the context of the company's operating procedures and the evidence about the qualifications of the selectee. Respondent had no formal procedures for making promotions, for upgrading a particular position or for distinguishing between the two. TR 3-131. Respondent had no statement or description of the qualifications for the

job of accounting clerk intermediate, which was a bookkeeping position.

Petitioner Patterson had a college degree and more seniority with the company, while Williamson had taken college courses in accounting, but did not obtain a degree. Patterson had performed some bookkeeping functions with her prior employer. TR 1-21 to 1-22. Respondent admitted that Williamson had to be trained in the bookkeeping functions that she performed. TR 3-187 to 3-188. Patterson testified that Williamson was given new tasks and new training for the new job of accounting clerk intermediate. TR 1-49, 2-56 to 2-57. Although respondent allegedly gave Williamson the promotion to reward her outstanding past performance, one supervisor testified that Williamson's performance was unsatisfactory and that she did not understand accounting

functions. TR 2-189, 2-189 to 2-190.²⁶

In this situation and given petitioner's direct evidence, it is the jury's province to decide whether racial discrimination biased that decisionmaking process.

²⁶ Respondent incorrectly asserts that this supervisor said only that Williamson did not understand data processing. Respondent also asserts that this supervisor's testimony "is irrelevant or severely limited" because he was terminated for poor job performance. Brief for Respondent at 3 n.3. In fact, the record strongly supports the inference that this supervisor was terminated for opposing racial discrimination practiced by respondent. See TR 2-164 to 2-169.

CONCLUSION

For the reasons stated, the Court should reverse the decision of the Court of Appeals and remand the case for a new trial.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON, PETITIONER

v.

MCLEAN CREDIT UNION

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

1. Whether a plaintiff may state a cause of action under 42 U.S.C. 1981 based on alleged racial harassment by her employer.

2. Whether, in an action under 42 U.S.C. 1981 for alleged racial discrimination in promotion, the plaintiff must demonstrate that she was more qualified than the person who was actually selected for the position to which the plaintiff sought promotion.

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INTEREST OF THE UNITED STATES

The United States has responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The decision of the court below turned in large part on its understanding of Title VII's coverage and of the evidentiary standards and presumptions used in Title VII cases for evaluating whether intentional discrimination has been established; thus, this Court's decision has potential importance for the future interpretation of Title VII and for the responsibilities of the United States in enforcing that statute. Further, the availability of remedies

(1)

under 42 U.S.C. 1981 for acts of racial discrimination in employment affects the degree of compliance with, and the allocation of government resources in enforcing, the proscriptions of Title VII. For similar reasons, the United States has participated as *amicus curiae* in other cases involving 42 U.S.C. 1981. See, e.g., *Goodman v. Lukens Steel Co.*, No. 85-1626 (June 19, 1987); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

STATEMENT

1. Petitioner, Brenda Patterson, is a black female (Pet. App. 3a). She was an employee of respondent, McLean Credit Union, from May 5, 1972 to July 19, 1982 (*ibid.*). Following her July 19, 1982 layoff, petitioner instituted this suit, alleging that respondent had violated 42 U.S.C. 1981 by harassing her, failing to promote her, and discharging her, because of her race (Pet. App. 2a). Petitioner also asserted a pendent state law claim of intentional infliction of emotional distress (*ibid.*). Apparently because of statute of limitations problems, petitioner did not assert any claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a n.*).

2. At trial, petitioner testified that, at the time she was hired, respondent's president, Robert Stevenson, told her that the white women in the office would not like her because she was black (Pet. App. 3a-4a). Petitioner further testified that, during her ten years of employment with respondent, she was subjected to what she considered to be racially motivated harassment by Stevenson (*id.* at 4a). Specifically, she alleged that Stevenson assigned her an excessive number of tasks (and thus placed great pressure on her), made her perform tasks (such as sweeping and dusting) that white employees did not perform, once told her that black employees are known to

work more slowly than white employees, periodically stared at her for several minutes at a time, and criticized her in staff meetings while not similarly criticizing her fellow white employees (*id.* at 4a-5a). Finally, petitioner testified that, although she repeatedly expressed interest in advancing from her file clerk position to an accounting or secretarial position, respondent did not post job openings or otherwise inform her of vacancies in these positions; that whites with less education than she had were hired when secretarial or accounting positions opened; that a white employee named Susan Williamson was trained for and promoted to the position of "Account Intermediate" even though she had less seniority than petitioner; and that, when petitioner was laid off, respondent retained white employees with less experience than petitioner (*id.* at 5a; I Tr. 12, 21-23, 49, 91-96; II Tr. 58-61, 100-101). Respondent denied these allegations and, among other things, offered evidence that Williamson's qualifications—in terms of job evaluations and educational background—were superior to petitioner's qualifications (Pet. App. 19a; I Tr. 11-12, 21; II Tr. 52, 58-61, 105; III Tr. 48-51; IV Tr. 31-35, 110-115).

3. At the close of the evidence, the district court granted respondent's motion for directed verdict with respect to the state tort and racial harassment claims, but denied the motion insofar as it sought dismissal of petitioner's other discrimination claims (Pet. App. 2a-3a). On the state tort claim, the court ruled that Stevenson's alleged treatment of petitioner did not rise to the level of "outrageousness" and "extremity" required for recovery under the law of intentional infliction of emotional distress in the State of North Carolina (*id.* at 6a, 11a-12a). On the racial harassment claim, the court held that, while evidence of harassment is admissible as proof of discriminatory intent on issues relating to promotion, lay-off, and discharge, such alleged harassment does not state a distinct claim under 42 U.S.C. 1981 (Pet. App. 6a,

24a). Finally, on the other discrimination claims, the court ruled that petitioner had adduced sufficient evidence to justify submitting the case to the jury (*id.* at 6a, 24a-25a). Over objection by petitioner, however, the court instructed the jury that, on the promotion discrimination claim, petitioner was required to prove that she was more qualified than Susan Williamson for promotion to the intermediate accounting clerk position and, in addition, that she was denied the promotion because of her race (*id.* at 18a; V Tr. 12-14, 29-30).¹ The jury returned a verdict in favor of respondent (Pet. App. 6a).

¹ The instruction stated (V Tr. 12-14 that:

“ * * * You will first consider Issue 1(a). Part (a) of Issue 1 relates to plaintiff's contention that the defendant denied plaintiff a promotion because of her race. In order to carry her burden on Issue 1(a), the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, [and] plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arise within the credit union; (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.

With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race. Plaintiff offered evidence tending to show that defendant's stated reasons for not promoting plaintiff were not its real reasons but a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that it did not deny plaintiff the promotion because of her race. * * *

For the plaintiff, Mrs. Patterson, to prevail upon this issue, it is necessary that she satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's intentional discrimination against her because of her race was the real reason she did not receive the promotion.

4. The court of appeals affirmed (Pet. App. 1a-20a). It agreed that petitioner's “evidence was not sufficient to support submission [to the jury] of her pendent state claim of intentional infliction of mental and emotional distress” (*id.* at 11a). It further agreed that petitioner's “claim for racial harassment is not cognizable under [42 U.S.C.] 1981” (*id.* at 7a). It reasoned that “[t]he broader language of Title VII, which makes unlawful ‘discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race,’ * * * stands in critical contrast to [Section] 1981's more narrow prohibition of discrimination in the making and enforcing of contracts” (*id.* at 7a-8a (emphasis in original, citation omitted)). The court thus concluded that, while “[i]nstances of racial harassment * * * may implicate the terms and conditions of employment under Title VII, * * * and of course may be probative of the discriminatory intent required to be shown in a [Section] 1981 action, * * * standing alone, racial harassment does not abridge the ‘right to make’ and ‘enforce’ contracts—including personal service contracts—conferred by [Section] 1981” (*id.* at 9a (citation omitted)).

The court also rejected petitioner's argument that “the trial court erroneously instructed the jury that[,] in order for her to prevail on her promotion discrimination claim, she had to show that she was more qualified than Susan Williamson” (Pet. App. 18a). It stated that, “once [the] employer * * * advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion [was] upon the claimant to satisfy the trier of fact that the employer's proffered reason [was] pretextual” (*id.* at 19a), and that, to do so, “the claimant [had] to prove her superior qualifications * * *” (*ibid.*). This requirement, the court said, “reflects the principle established in Title VII cases that an employer may, without illegally

discriminating, choose among equally qualified employees notwithstanding [that] some may be members of a protected minority" (*id.* at 20a).

SUMMARY OF ARGUMENT

I. Title 42 U.S.C. Section 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens" It is now well-established that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts, including contracts of employment. At the same time, however, it also seems clear that Section 1981 does not itself create or define, either in whole or in part, the covenants of the private contracts to which its prohibition is applicable. Accordingly, the Court has found violations of Section 1981 only where there is intentional racial discrimination in decisions relating to, or laws concerning, the execution, definition, or performance of contractual opportunities and obligations existing apart from Section 1981 itself. See, e.g., *Goodman v. Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 6-12; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 276, 285-286 (1976).

A Section 1981 violation may, of course, rest on discrimination in connection with a contractual covenant agreed to or offered by the parties. But contractual covenants may also be implied in law. It is through such a covenant, either agreed to or implied in law, that the predicate for an action under 42 U.S.C. 1981 concerning alleged racial harassment in employment may and must be supplied. In this regard, we note that the common law has traditionally read into all contracts, by implication, an obligation of good faith and fair dealing that generally prohibits the parties to a contract from wrongfully preventing or substantially hindering each other from per-

forming their respective contractual obligations. Employment contracts have not been excepted from this implied covenant of good faith and fair dealing. Thus, where state law implies into a contract some such covenant of good faith and fair dealing, as it generally will, the parties to an employment contract are obliged to refrain from actions aimed at wrongfully hindering or substantially preventing performance by the other. Where these actions are racially motivated and are of sufficient severity and pervasiveness to establish that the harassed employee has been deprived of her right to enjoy the covenant of good faith and fair dealing that is enjoyed by employees of other races, a violation of 42 U.S.C. 1981 should be found.

We doubt, however, that the implied covenant of good faith and fair dealing embodies as extensive a prohibition of racial harassment as does Title VII. Accordingly, Section 1981 likely will cover only a subset of the racial harassment cases covered by Title VII. And we further doubt that Congress in enacting Title VII intended that Title VII's prohibition against racial harassment would itself be treated as an implied term of every employment contract, the violation of which in turn would give rise to a claim under 42 U.S.C. 1981. Such a conclusion would contradict Congress's intention that enforcement of Title VII's prohibitions occur exclusively through Title VII's carefully calibrated procedural and remedial mechanisms.

Our preliminary research indicates that the State of North Carolina, which is the relevant jurisdiction in this case, follows the general pattern of the common law in that, as a matter of state law, it implies in every contract a species of the covenant of good faith and fair dealing. Accordingly, unless petitioner's evidence of harassment was such that no reasonable person could have found a breach of the covenant of good faith and fair dealing implied by North Carolina law, the harassment

claim under Section 1981 should have been submitted to the jury. The jury should have had the opportunity to find that the preponderance of the evidence showed that respondent, by its harassing actions and on account of petitioner's race, wrongfully deprived petitioner of the benefit of the covenant of good faith and fair dealing implied in North Carolina law.

II. The court below also erred in upholding the district court's instruction that petitioner's discriminatory denial of promotion claim had to fail unless the jury found that petitioner was more qualified for the job than was Susan Williamson and, in addition, that petitioner was denied the promotion because of her race. Only the second element of the court's instruction—the presence of a discriminatory purpose behind the employment decision—is in fact required. A plaintiff may show this discriminatory purpose in many ways. She may rely on evidence that she was more qualified than the candidate who was actually selected for the position. Or she may prove discriminatory intent by showing that she had the minimum qualifications necessary for the job and, in addition, that the employer's proffered justification for denying her the job was pretext. In all events, the ultimate question remains the same—whether or not the employer denied the plaintiff the petition sought because of her race. Once the fact-finder makes that determination, there is no reason for it to ask the additional question whether the plaintiff's qualifications were superior to those of the person who actually received the promotion; the ultimate question of discrimination has already been resolved.

ARGUMENT

I. A PLAINTIFF MAY STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1981 BASED ON ALLEGED RACIAL HARASSMENT BY HER EMPLOYER WHERE STATE LAW IMPLIES INTO THE EMPLOYMENT CONTRACT A COVENANT OF GOOD FAITH AND FAIR DEALING

The court below erred in holding that racial harassment may never state a distinct claim under 42 U.S.C. 1981. It is true that Section 1981 proscribes only race-based denials of the opportunity to make or perform contracts. It is also true that Title VII is not, like Section 1981, strictly confined by its terms to contractual relationships; Title VII makes racial harassment in the employment context a wrong independent of the terms of the employment contract. The court below was mistaken, however, in concluding from these premises that racial harassment may never state a distinct claim under 42 U.S.C. 1981. On the contrary, where an employment contract includes, either explicitly or by implication, a covenant of good faith and fair dealing, as is the case in most if not all jurisdictions, severe and pervasive racial harassment may well create the necessary predicate for a Section 1981 claim; it may deprive its victim of the right to enjoy the benefits of a contractual covenant that is enjoyed by employees of other races. Our preliminary research indicates that the common law of the State of North Carolina contains an implied covenant of this sort. Accordingly, we believe that the court below erred in holding that petitioner's allegation of racial harassment could not state a distinct claim under 42 U.S.C. 1981.

A. We begin by defining with some specificity our understanding of the contours of 42 U.S.C. 1981's prohibition, as interpreted by this Court. The statute provides, in pertinent part, that "[a]ll persons within the

jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *." While there has been considerable controversy as to whether this statutory commandment was intended to do anything more than prohibit state laws that would disable persons on the basis of their race from making or enforcing contracts (see *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386-388 (1982); *Rumson v. McCrory*, 427 U.S. 160, 192-214 (1976) (White, J., dissenting); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449-480 (1968) (Harlan, J., dissenting)), "[i]t is now well established that * * * 42 U.S.C. 1981[] prohibits racial discrimination in the making and enforcement of private contracts" (*Rumson v. McCrory*, 427 U.S. at 168). See also *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 382-391; *id.* at 405-406 (Stevens, J., concurring); *Rumson v. McCrory*, 427 U.S. at 189-192 (Stevens, J., concurring).

Employment contracts are plainly among the "private contracts" to which Section 1981's prohibition has been held applicable. See *Goodman v. Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 6-12; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); but cf. *Rumson v. McCrory*, 427 U.S. at 187-189 (Powell, J., concurring) (suggesting that some contracts are so personal as to have a discernible rule of exclusivity which is inoffensive to Section 1981). Thus, an employer violates Section 1981 when it refuses to hire black persons at all, for in such cases it has denied black persons "the same right * * * to make * * * contracts * * * as is enjoyed by white citizens" (42 U.S.C. 1981). Similarly, an employer violates Section 1981 when it fires black persons or refuses to consider them for promotions because of their race, since such actions effect the same

discriminatory denial of contractual opportunities as refusals to hire in the first instance. And, finally, an employer violates Section 1981 when it intentionally assumes different contractual obligations with respect to black persons than to white persons, or intentionally fails in a discriminatory manner to comply with its contractual obligations, since in each instance the employer is denying black persons the contractual opportunities offered to white persons. See *Goodman v. Lukens Steel Co.*, slip op. 6-12; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286.

Section 1981 does not, however, itself purport to create any of the private contractual obligations to which its prohibition is applicable. Accord, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 396 ("The language of the statute does not speak in terms of duties."). Contractual covenants are created and for the most part defined by the parties. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-842 (1982); *Evans v. Abney*, 396 U.S. 435, 455-447 (1970). Section 1981 creates only the simple, albeit significant, guarantee that the opportunity to enter into and fully perform contracts shall not be denied, impeded, or frustrated on the basis of race. See *Goodman v. Lukens Steel Co.*, slip op. 4 ("competence and capacity to contract shall not depend upon race"). Accordingly, in cases initiated under Section 1981, the Court has found violations only where there is racial discrimination in decisions relating to, or laws concerning, the execution, definition, or performance of contractual covenants existing apart from Section 1981 itself.

For example, in *Goodman v. Lukens Steel Co.*, *supra*, before deciding whether the union involved there had violated Section 1981 through its actions, the Court reviewed the findings of the trial court concerning the obligations assumed by the employer and the union in their collective bargaining agreement. The Court noted

that the trial court had found that the non-discrimination clause of the collective bargaining agreement prohibited, and thus made grievable, racial harassment and racially-motivated terminations of probationary employees. Slip op. 10-11. Only after accepting these findings did the Court hold that the union had violated 42 U.S.C. 1981 (and Title VII) by refusing to file grievances on behalf of black employees who claimed that they were the victims of racial harassment or racially-motivated terminations. *Goodman v. Lukens Steel Co.*, slip op. 7-8. Refusing to file such grievances, the Court held, intentionally deprived these black employees of the contractual opportunities provided to all employees by the collective bargaining agreement. *Id.* at 11-12.

Similarly, in *McDonald v. Santa Fe Trail Transp. Co.*, *supra*, before deciding whether the white employees involved there could state a claim under Section 1981, the Court reviewed the allegations of the complaint concerning the terms on which the employer was willing to offer employment. The Court accepted the allegations of the two white employee petitioners that they and another black employee had been charged with misappropriating property from their employer and that only they, and not the black employee, had been discharged. 427 U.S. at 276. On these allegations, the Court held that the white employees could state a claim under 42 U.S.C. 1981; the white employees had been denied the specific contractual opportunity made available to the black employee—continued employment notwithstanding charges of misappropriation of the employer's property. 427 U.S. at 285-286, 295-296.

The decisions in *Lukens Steel Co.* and *Santa Fe Trail Transp. Co.* indicate that a Section 1981 violation arises only from purposeful racial discrimination in connection with contractual arrangements existing apart from Section 1981—*e.g.*, arrangements to hire, fire, promote, and pay wages for performance of designated duties. Thus, the question raised by this case—whether a plaintiff may

state a cause of action under 42 U.S.C. 1981 based on alleged racial harassment by her employer—turns on (a) whether, and to the extent that, an employer has agreed in an employment contract, either explicitly or by implication (in law or fact), to refrain from such actions, and (b) whether the alleged contractual violation occurred and was motivated by race.² Whenever such a contractual breach exists, proof that it was motivated by race should suffice to state a cause of action under 42 U.S.C. 1981.

B. The predicate contractual obligation necessary for a Section 1981 racial harassment claim may arise from an express term of a contract, as was apparently the case in *Lukens Steel Co.* A relevant covenant could also, however, be implied in law. We are not aware of any covenant implied in law that proscribes harassment as such, for harassment is analyzed more naturally as an issue of tort (and not contract) law. See Restatement (Second) of Torts §§ 46-47, 766-767 (1965).³ But the common law of contract generally does imply in all contracts a covenant of good faith and fair dealing. See Restatement (Second) of Contracts § 205(d), at 101-102 (1981). The breach of this covenant could well be proved by evidence of harassment sufficient to frustrate, impede, or prevent performance of the contract, and, we believe, such a breach would supply the necessary contractual predicate for a Section 1981 claim, if motivated by race.⁴

² The prohibition of 42 U.S.C. 1981 is, of course, not limited to employment contracts. See *Runyon v. McCrary*, *supra*.

³ Petitioner recognized the tort aspect of her claim. She argued that she was the victim of intentional infliction of mental and emotional distress. See Pet. App. 11a-15a.

⁴ The implied covenant of good faith and fair dealing is a basic feature of the common law of contracts. See Restatement (Second) of Contracts, *supra*, § 205; U.C.C. §§ 1-201:19, 2-103 (1981). As many commentators have noted, a coherent system of contractual obligation requires some such implied covenant; it is difficult to

More specifically, the common law has traditionally implied in all contracts a covenant that the parties to the contract will refrain from wrongfully preventing or substantially hindering each other from performing their respective contractual obligations. See Restatement (First) of Contracts §§ 295, 315 (1932); 3A A. Corbin, *Corbin on Contracts* § 770, at 557 (1960). On this theory of the implied covenant, "if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure" (5 S. Williston, *Williston on Contracts* § 677, at 224 (W. Jaeger 3d ed. 1967)). In such a situation, further performance is excused at the option of the victim of the breach; indeed, the victim may recover damages on the contract if she can show that she would have been ready, willing, and able to perform the contract but for the wrongful prevention or substantial hinderance by the other party. See Restatement (First) of Contracts, *supra*, § 315; *Corbin on Contracts* § 770, at 557.

Employment contracts have not been excepted from this implied covenant of good faith and fair dealing. As Williston explains, even in contracts for a specific term, "[i]nsolent or disrespectful language or conduct on the part of a servant will justify dismissal" (9 *Williston on Contracts, supra*, § 1014A, at 59). "Similarly, the employer is under a duty to refrain from language or conduct of so severe or offensive a nature * * as to justify the employee in leaving" (*id.* at 60). As in any contract,

imagine a system of contract law in which the terms of contractual agreements would not be evaluated against a background assumption that the parties have agreed to act in good faith in their dealings with each other. See, e.g., Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 686 (1963); Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 Marq. L. Rev. 1 (1971).

the employer and employee conventionally are under an implied obligation not to wrongfully prevent or substantially hinder each other's performance.⁸

⁸ This conventional obligation of good faith and fair dealing must be distinguished from the doctrine that some states have recently used to limit the freedom of employers to discharge employees who are employed at-will—i.e., without a specific term. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). The conventional common law obligation of good faith and fair dealing provides only that, while a contract continues, each party to the contract must refrain from activity that would impair or unduly burden the performance of the contract by the other party; it places no durational term on the contract or restrictions on the reasons why a contract may be discontinued. Restatement (Second) of Contracts, *supra*, § 205, at 99-100. The conventional common law obligation of good faith and fair dealing thus has co-existed quite comfortably with another conventional rule—that, where a contract does not contain a specific durational term, it may be terminated at-will by either party for any reason. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 319-321, 171 Cal. Rptr. at 920-922; Note, *Defining Public Policy Torts in At-Will Dismissal*, 34 Stan. L. Rev. 153, 154-155, 158-159 (1981). Those states that have modified or abandoned the at-will rule have simply extended the covenant of good faith and fair dealing beyond its traditional origins and function so as to support an implied term of more permanent employment. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. at 133, 316 A.2d at 551-552.

It is therefore irrelevant to this case that the State of North Carolina, where this lawsuit was initiated, adheres to the common law doctrine of employment at-will. See *Guy v. Travenol Laboratories, Inc.*, 812 F.2d 911, 912-915 (4th Cir. 1987) (reviewing meaning and status of at-will employment doctrine in State of North Carolina). The at-will employment doctrine would not protect an employer from liability under 42 U.S.C. 1981 if it had discharged an employee for racial reasons any more than if it had refused to contract with the employee for racially motivated reasons in the first place. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286. Accordingly, the at-will doctrine cannot give an employer immunity for such racial harassment as would have provided an employee with the necessary contractual justifica-

Racial harassment may therefore be actionable under 42 U.S.C. 1981 where, as is generally the case, state law implies some such covenant of good faith and fair dealing into the contracts governed by the law of that jurisdiction.⁶ In such circumstances,⁷ the relevant questions

tion for quitting, even if she did not quit. Where the implied covenant of good faith and fair dealing exists at state law, an employer generally must refrain from impairing or unduly burdening an employee's performance on the contract while her employment continues, even if either party could have terminated the employment without notice and for any (non-racial) reason.

⁶ The law of the various states with respect to the implied covenant of good faith and fair dealing is summarized and annotated in the appendices to the first and second Restatement of Contracts. Federal courts are, of course, courts of limited jurisdiction and thus ordinarily do not have the power to imply common law contract terms (as do the courts of the states); they must apply the contract law of the state relevant to the controversy in issue. *United States v. Standard Oil Co.*, 332 U.S. 301, 313 (1947); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). We note, however, that in certain contexts, such as in the collective bargaining and admiralty contexts, this Court has held that federal courts do have some limited common lawmaking powers. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963); see generally *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95-97 (1981). In these exceptional cases involving collective bargaining agreements and admiralty contracts, it may well be, though the Court need not now decide, that a general duty of good faith and fair dealing could be implied as a matter of federal contract law. See *United States v. Peck*, 102 U.S. 64, 65-66 (1880); *Manners v. Morano*, 252 U.S. 317, 326-327 (1920). But see *H.K. Porter Co. v. NLRB*, 397 U.S. 53, 108 (1970).

⁷ That the scope of Section 1981's coverage may vary from state to state should not be surprising. Congress did not intend in Section 1981 to nationalize the law of contracts; rather, it intended only to ensure that, whatever the law is in any particular jurisdiction, the opportunity to contract is the same for persons of all races in that jurisdiction. Accordingly, it is quite natural that the analysis of Section 1981 claims turns on the law of the relevant state (or the express agreement of the parties). See generally *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 386-391.

become whether, as a factual matter, the actions of which the plaintiff complains—such as insulting language, excessive work assignments, demeaning work assignments, etc.—constitute a breach of the express or implied terms of the contract and, if they do, whether these actions were motivated by racial animus.⁸ If such contractual terms have been breached and breached with the requisite racial purpose, a violation of Section 1981 is stated. See *Goodman v. Lukens Steel Co.*, slip op. 10-12; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 387-391; *Runyon v. McCrary*, 427 U.S. at 170-171; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286.

C. The implied covenant of good faith and fair dealing referred to above relates only to the performance of contractual obligations and responsibilities. Thus, in its conventional form, it is not offended by every incident of discourtesy or discord among the parties. Petty annoyances, trifling irritations, and, indeed, quite volatile exchanges frequently arise in contractual contexts, especially where, as in employment contracts, the parties are in relatively long-term, continuous, and personal relationships. The common law does not usually allow these disagreements and differences to relieve parties of their respective obligations, or to subject either of the parties to damages, unless the offensive actions are sufficiently

⁸ Although it is doubtful, as a practical matter, whether the duty of good faith could be eliminated altogether or whether state law would countenance any such attempt, parties are generally free to limit, alter, and specify the matter covered by a covenant implied in state law. 42 U.S.C. 1981, as interpreted by this Court, would, however, prohibit parties from agreeing by contract to modify any implied covenant specifically to allow racial discrimination against one party by the other. See generally *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 285-296. And 42 U.S.C. 1981 would also prohibit an employer from making an express covenant of good faith and fair dealing with its white but not its black employees. See *ibid.*

severe and pervasive. See 9 *Williston on Contracts*, *supra*, § 1014A, at 59; *Corbin on Contracts* § 770, at 557-559. The nature of the conventional common law covenant, and thus the implications for litigation under 42 U.S.C. 1981 can, we think, be usefully contrasted with the protections afforded civil rights litigants by Title VII of the Civil Rights Act of 1964.

1. The conventional covenant of good faith and fair dealing implied in law would certainly be violated by circumstances amounting to a constructive discharge under Title VII. In constructive discharge cases under Title VII, it is not enough for the plaintiff to establish that employment would have continued under conditions containing substantial elements of discrimination. See *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980); *Myer v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), cert. denied, 423 U.S. 825 (1975). Rather, the plaintiff-employee must establish, among other things, that her working conditions were so difficult and intolerable that a reasonable person in her shoes would have felt compelled to resign.⁹ Although this is much like the analysis that a court follows in determining whether a breach of the implied covenant of good faith and fair dealing has been established (see *Restatement (Second) of Contracts*, *supra*, § 237, at 215-222), from a contract perspective, even if a harassed employee would be justified in quitting, she need not actually do so: She may stay on the job and treat the breach

⁹ In this way, the employee establishes that it was the actions of the employer, rather than her own choice, that led to the termination of the employment. See, e.g., *Williams v. Caterpillar Tractor Co.*, 779 F.2d 47, 49-50 (6th Cir. 1985); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-889 (3d Cir. 1984); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 672-673 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Irving v. Dubuque Packing Co.*, 680 F.2d 170, 172-173 (10th Cir. 1982).

of the implied condition of good faith and fair dealing as a mere breach of a term of the contract and, if the breach is racially motivated, seek recovery under 42 U.S.C. 1981. See generally *Goodman v. Lukens Steel Co.*, slip op. 10-12.¹⁰

2. On the other hand, there is no reason to believe that the conventional covenant of good faith and fair dealing is in all respects equivalent to and co-extensive with the prohibition against racial harassment contained in Title VII. See *Meritor Savings Bank v. Vinson*, No. 84-1979 (June 19, 1986), slip op. 9. There are undoubtedly situations in which a working environment may be so infected with discriminatory attitudes as to constitute a violation of Title VII,¹¹ but which nevertheless are not so severe or pervasive as to justify the conclusion that performance has been wrongfully prevented or substantially hindered. Thus, unless a state has a particularly expansive covenant of good faith and fair dealing, Section 1981 will likely provide a remedy only for a subset of the harassment cases that, in all events, can be remedied under Title VII. Cf. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 405 U.S. 957 (1972) (Hispanic employee established a Title VII violation by demonstrating that her employer created an offensive working environment for employees by giving discriminatory service to its Hispanic clientele); 29 C.F.R. 1604.11(a)

¹⁰ Of course, her failure to quit may constitute evidence that the employer's actions were not so severe and pervasive as materially to frustrate, impede, or prevent performance of the contract; and it has been held that a failure to quit defeats a constructive discharge claim under Title VII. *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 146, 144 (5th Cir. 1975); *EEOC Dec. 84-1*, 33 Fair. Empl. Prac. Cas. (BNA) 1887, 1892 (1983).

¹¹ Even under Title VII, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment * * *." *Meritor Savings Bank v. Vinson*, No. 84-1979 (June 19, 1986), slip op. 9.

(emphasis added) (conduct constitutes prohibited harassment for purposes of Title VII when it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

3. Nor can Title VII's prohibition against racial harassment be treated as an implied term of the employment contract, the violation of which itself justifies suit under 42 U.S.C. 1981. The workplace is a theater in which all sorts of personalized interactions, grievances, and dramas are played out. The mechanism built into Title VII for conciliating and screening the disputes that arise out of these interactions, as well as the limitations placed on both the time within which complaints must be filed and the relief available with respect to them, allows Title VII to cast its net quite widely—far beyond the terms and conditions of the employment contract. Accord, *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (emphasis in original) ("An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual right of employment, may qualify as a 'privileg[e]' of employment under Title VII"). In actions initiated under 42 U.S.C. 1981, by contrast, these disputes are catapulted directly into court for evaluation by a jury, which may award punitive as well as compensatory damages. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 457-461. In similar circumstances, the Court has said that Title VII's proscriptions may not form the basis for an action under another civil rights statute, because to do so would undermine Title VII's carefully calibrated procedural and remedial scheme. See *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372-378 (1979) (holding that Title VII rights are not enforceable in actions initiated under 42 U.S.C. 1985(3));

cf. *Brochen v. GSA*, 425 U.S. 820, 833 (1976). That same judgment is appropriate here.¹²

D. The fact that Title VII's coverage within the employment sphere is not confined to contractual obligations—explicitly assumed or implied in law—and will therefore generally be broader than the coverage of 42 U.S.C. 1981 does not, as the court below suggested (Pet. App. 7a-11a), carry the implication that a plaintiff may not state a cause of action under Section 1981 based on alleged racial harassment by her employer. That conclusion would follow only if the law of the relevant jurisdiction did not create an implied covenant not to prevent wrongfully or hinder unreasonably the performance of the underlying contract.¹³ But our preliminary research indicates that the State of North Carolina, which is the relevant jurisdiction in this case, follows the general pattern of the common law in recognizing a species of the covenant

¹² Indeed, since Section 1981's proscription applies to many kinds of private contracts other than those entered into by employers and employees (*Ryan v. McCrory*, *supra*), it would be quite odd for Section 1981's enforcement of the common law respecting contracts to take its lead from an employment statute like Title VII. The Court has rejected such arguments in the past. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461 ("the remedies available under Title VII and under [Section] 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent").

¹³ A state may not, of course, refuse to count serious racial harassment as an instance of the hinderance and undue burdening of contractual performance that would otherwise constitute a violation of an implied covenant that exists in the state's common law of contract. The principal object of 42 U.S.C. 1981 is to eradicate precisely such kinds of state laws—i.e., those that disable persons on the basis of their race from making and performing contracts. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 386-387.

of good faith and fair dealing.¹⁴ Accordingly, unless no reasonable person could have found the evidence of harassment here sufficient to support a breach of the covenant implied in North Carolina law, the matter should have been submitted to the jury with instructions that it find in favor of petitioner if the preponderance of the evidence showed that respondent, by its actions and for racial reasons, deprived petitioner of the benefit of this covenant implied in state law.¹⁵ The failure of the court

¹⁴ See, e.g., *Commercial Nat'l Bank v. Charlotte Supply Co.*, 226 N.C. 416, 431-432, 38 S.E.2d 503, 513 (1946) ("[w]here complete performance is rendered impossible by a party to a contract who has the duty of counter performance, the latter cannot take advantage of his own act and refuse performance on his part"); *Mullen v. Sawyer*, 277 N.C. 623, 633-634, 178 S.E.2d 425, 431 (1971) (same); see also *Barron v. Coia*, 216 N.C. 282, 284, 4 S.E.2d 618, 620 (1939) (plaintiff may recover damages for breach of a lifetime service contract where plaintiff's failure to perform "was due to no fault of the plaintiff but was caused by the wrongful conduct of the defendant in assaulting the plaintiff with a deadly weapon, running him off of the premises and threatening to do him great bodily harm if he returned").

¹⁵ Petitioner proposed (C.A. App. 22) the following jury instruction relating to her claim of racial harassment under Section 1981:

The plaintiff has also brought an action for harassment in employment against the defendant, under the same statute, 42 U.S.C. § 1981. An employer is guilty of racial discrimination in employment where it has either created or condoned a substantially discriminatory work environment. An employee has a right to work in an environment free from racial prejudice. If the plaintiff has proved by a preponderance of the evidence that she was subjected to racial harassment by her manager while employed at the defendant, or that she was subjected to a work environment not free from racial prejudice which was either created or condoned by the defendant, then it would be your duty to find for the plaintiff on this issue. If she has

below to view the case from this perspective makes defective its judgment that petitioner's allegation of racial harassment could not state a distinct claim under Section 1981.

II. THE PLAINTIFF IN AN ACTION UNDER 42 U.S.C. 1981 FOR ALLEGED DISCRIMINATION IN PROMOTION DOES NOT HAVE TO DEMONSTRATE THAT SHE WAS MORE QUALIFIED THAN THE PERSON WHO WAS ACTUALLY SELECTED FOR THE POSITION TO WHICH PLAINTIFF SOUGHT PROMOTION

The court below also held that, in order to find that respondent unlawfully discriminated against petitioner in denying her the promotion to the position of intermediate accountant, the jury had to find both that petitioner was more qualified than Susan Williamson, the woman that respondent actually selected for the position and, in addition, that petitioner was denied the promotion because of her race. This holding is plainly wrong.

A. The object of proof in a case initiated under 42 U.S.C. 1981 is discriminatory purpose. See *Goodman v. Lukens Steel Co.*, slip op. 8 n.10; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 391. As in actions under Title VII, the "factual inquiry" in such a case is simply "[whether] the defendant intentionally discriminated against the plaintiff" on the basis of race. *United States Postal Serv. Bd. of Govs. v. Aikens*, 460

failed to do so, or you are unable to tell where the truth lies, it would be your duty to find for the defendant.

The question whether the petitioner, by this proposed instruction and by any other statements or objections appearing in the record, has adequately preserved a claim of racial harassment based on the discriminatory denial of contractual opportunities or breach of express or implied contractual terms enforceable under state law is best left to resolution by the courts below, along with the question of the legal sufficiency of the evidence in support of such a claim.

U.S. 711, 715 (1983) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Stated differently, "[t]he central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race * * *.'" *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

B. This Court has made clear that evidence of discriminatory purpose may "take a variety of forms" (*Furnco Constr. Corp. v. Waters*, 438 U.S. at 578). The finder of fact may, for example, rely on direct evidence of intentional discrimination—that is, "eyewitness" testimony as to the employer's mental processes" (*United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. at 716). Alternatively, the finder of fact may rely on circumstantial evidence showing "that the employer's proffered explanation is unworthy of credence" (*ibid.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 256)). Such circumstantial evidence could include proof that the qualification upon which the employer has purported to rely has not been required equally of white and black candidates. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the plaintiff] during [her] prior term of employment * * * and petitioner's general policy and practice with respect to minority employment" (*id.* at 804-805). "On the latter point, statistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [its actions] * * * conformed to a general pattern of discrimination against blacks" (*id.* at 805). But whatever forms the evidence takes, the ultimate question for the fact-finder remains: whether the employee has shown by a preponderance of the evidence that the employer intentionally denied the employee the job or benefit in question because

of her race. See *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. at 714, 715-716.

C. Viewed from this perspective, the holding of the court below—that, where the employer articulates the superior qualifications of another candidate as the basis on which it made a decision, the fact-finder must find both that the plaintiff was more qualified than the candidate who was actually selected and that the plaintiff was denied the promotion on the basis of race—is plainly wrong. The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race the plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected. Or she may prove that she had the minimum qualifications necessary for the job and that other evidence—direct or circumstantial—establishes that the asserted justification of superior qualifications is simply a pretext for the employer's discriminatory motive. For example, the plaintiff may show that the employer denied her the promotion because of prejudice or stereotypical attitudes and beliefs on its part;¹⁶ that the employer never truly considered the plaintiff for promotion;¹⁷ that the employer's reasons constantly shifted;¹⁸ that the em-

¹⁶ See, e.g., *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707-708 (6th Cir. 1985); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556-1557 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *Martin v. State of Cal. Parks & Recreation Dep't*, 671 F.2d 360, 362 (9th Cir. 1982).

¹⁷ See, e.g., *Joshi v. Florida State Univ. Health Center*, 763 F.2d 1227, 1235 (11th Cir.), cert. denied, 474 U.S. 948 (1985); *Lowery v. WMC-TV*, 658 F. Supp. 1240, 1250 (W.D. Tenn. 1987); *Morris v. Bianchini*, 43 Fair Empl. Prac. Cas. (BNA) 674, 679 (E.D. Va. 1987).

¹⁸ See, e.g., *Kilgo v. Bowmen Transp. Inc.*, 789 F.2d 859, 875 (11th Cir. 1986); *Schmitt v. St. Regis Paper Co.*, 811 F.2d 131, 132-133 (2d Cir. 1987).

ployer had no standards for measuring the contested qualifications;²⁰ that the selecting official did not know that the white applicant's qualifications were superior at the time of selection;²⁰ that the selecting official could not specify why he recommended the selectee and could not recall the selectivee's performance;²¹ or that there is valid statistical evidence supporting the proposition that the plaintiff was a victim of a pattern and practice of racial discrimination on the employer's part.²² But in all events, the fact-finder need not find that the plaintiff was more qualified than the candidate who was selected; it need only find, from the preponderance of the evidence, that the plaintiff would not have been denied the position but for the consideration of her race. The court below committed reversible error in requiring the fact-finder to make both determinations in this case.²³

²⁰ See, e.g., *Monroe v. Burlington Industries, Inc.*, 784 F.2d 568, 572 (4th Cir. 1986).

²⁰ See, e.g., *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 626 (1983), modified on other grounds, 714 F.2d 1066 (11th Cir. 1983), cert. denied, 465 U.S. 1066 (1984).

²¹ See, e.g., *Krodel v. Young*, 748 F.2d 701, 708-709 (D.C. Cir. 1984), cert. denied, 474 U.S. 817 (1985).

²² See, e.g., *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983); *Sweet v. Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir. 1983); *Anderson v. City of Albuquerque*, 690 F.2d 796, 801-802 (10th Cir. 1982).

²³ We take no position concerning whether petitioner's evidence was sufficient to persuade a trier of fact that respondent's decision was unlawfully motivated. We contend only that she should not have been required to prove her superior qualifications in addition to this unlawful motive. We note, however, that there is reason to doubt that petitioner can establish the requisite unlawful motive, since she may not have possessed the qualifications necessary to be considered for promotion to the intermediate accountant position when it was available. While this fact-bound question is not deserving of review by this Court, it should be addressed by the courts below on remand, before petitioner's promotion claim is resubmitted to a jury.

D. There is simply no basis for the court of appeals' suggestion (Pet. App. 20a) that a requirement of proof of superior qualifications "reflects the principle established in Title VII cases that an employer may, without illegally discriminating, choose among equally qualified employees notwithstanding [that] some may be members of a protected minority." While Title VII cases do establish that an employer "has discretion to choose among equally qualified candidates," they also establish that the exercise of that discretion may "not [be] based upon lawful criteria" (*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 249). Cf. *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975). Once the fact-finder determines by a preponderance of the evidence that the employer denied the plaintiff the promotion because of her race, there is no basis for suggesting that the fact-finder should also have to determine that the plaintiff had superior qualifications in order not to impair the employer's discretion to choose among equally qualified candidates. In such a case, the fact-finder has already determined that the employer did not seek lawfully to exercise this discretion.

CONCLUSION

The judgment of the court of appeals should be reversed in relevant part.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
v.

MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE RESPONDENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

87-107

BRENDA PATTERSON,
Petitioner,

v.

MCLEAN CREDIT UNION,
*Respondent.*On Writ of Certiorari to the United States
Court of Appeals for the Fourth CircuitBRIEF AMICUS CURIAE FOR THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the Respondent. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

As employers, the Council's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), as well as the Civil Rights Act of 1866 (Section 1981). As such, they have a direct interest in one of the issues presented for the Court's consideration: that is, whether in proving a case of intentional discrimination in the denial of a promotion, a plaintiff must demonstrate that she was better qualified than the individual(s) selected.¹

Because of its interest in the issues related to the standard of proof in employment discrimination cases, the Council has filed briefs *amicus curiae* in this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438

¹ The Court also granted certiorari on the question of whether racial harassment is actionable under Section 1981. This brief is limited to the issue of promotion discrimination.

U.S. 567 (1978); and *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The Petitioner, Brenda Patterson, is a former employee of the Respondent, McLean Credit Union. Ms. Patterson, a black female, worked for the credit union as a teller and file coordinator from May 1972 until July 1982 when she was laid off. In 1984, she initiated this action under 42 U.S.C. § 1981 alleging that she had been a victim of race discrimination by the employer. In particular, she alleges that she was subjected to racially-motivated harassment and that she was denied a promotion because of her race.²

The Petitioner's allegation of promotion discrimination challenges the employer's decision in 1982 to give the job title "Account Intermediate" to Susan Williamson, a white employee. Williamson had previously held the job title of "Account Junior." Petitioner alleges that this was a promotion, and that Williamson was less qualified than Petitioner for the job. At trial, the employer argued that this transaction was simply a change in Williamson's job title with no change in her responsibilities, functions or supervision. The employer presented evidence to show that Williamson was more qualified than Petitioner to do each job function required for the accounting position and that Williamson's annual performance evaluations had exceeded the Petitioner's.

² The district court granted a directed verdict on the claim of racial harassment.

The claim of promotion discrimination was submitted to the jury, which returned a verdict for the employer. On appeal, the Petitioner challenged the district court's instruction to the jury because it indicated that for Petitioner to prevail, she had to show that she was more qualified than Williamson. The Court of Appeals ruled that:

once an employer has advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual, that race discrimination is the real reason.

That was the situation here, and the district court therefore properly instructed the jury that the burden was upon the claimant to prove her superior qualifications by way of proving race discrimination as the effective cause of the denial to her of "promotion." . . . This simply reflects the principle established in Title VII cases that an employer may, without illegally discriminating choose among equally qualified employees notwithstanding some may be members of a protected minority.

Patterson v. McLean Credit Union, 805 F.2d 1143, 1147 (citations omitted). The Court of Appeals thus concluded that the trial court's instructions were proper.

SUMMARY OF ARGUMENT

The Petitioner takes issue with the trial court's instructions to the jury on the grounds, *inter alia*, that they were framed so as to require her to prove not merely that she was as well qualified for promo-

tion as the person selected, but that she was in fact *better* qualified. A mere showing that the Petitioner's qualifications were equal to those of the individual promoted, however, would not warrant a conclusion that the employer had based its decision on discrimination, rather than on its assessment of the individuals' relative qualifications.

It is well settled that the plaintiff in an individual promotion discrimination case bears the ultimate burden of proving intentional discrimination. The law set forth by this Court further provides that an employer has discretion in choosing among equally qualified candidates. Therefore, in a case alleging promotion discrimination, where the employer has responded to the plaintiff's evidence by showing that it promoted an individual it judged to be better qualified, the plaintiff cannot prevail simply by presenting evidence to show that she may have been as qualified as the person who received the promotion. Rather, unless it appears at the conclusion of all the evidence that the plaintiff was so clearly better suited for the position than the person selected that the employer, in the exercise of its discretion to judge their respective qualifications, could not reasonably have concluded otherwise, the plaintiff has failed to meet her burden of proving that the employer's explanation for its decision was pretextual.

ARGUMENT

WHEN THE EMPLOYER IN A PROMOTION DISCRIMINATION CASE HAS PRESENTED EVIDENCE THAT IT JUDGED THE PERSON PROMOTED TO BE BETTER QUALIFIED THAN THE PLAINTIFF, THE PLAINTIFF'S BURDEN OF PROVING INTENTIONAL DISCRIMINATION CANNOT BE SATISFIED SIMPLY BY A SHOWING THAT HER QUALIFICATIONS MAY HAVE BEEN EQUAL TO THOSE OF THE PERSON PROMOTED.

A. This Court Has Recognized That An Employer Has The Discretion To Choose Among Equally Qualified Candidates.

This Court has been very clear in ruling that an employer has the right to use its discretion in choosing among equally qualified candidates, provided that the choice is not based on illegal criteria. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Equally well established by this Court is the principle that the burden of proving intentional discrimination rests upon the plaintiff. *Burdine*, 450 U.S. at 254.³ To the extent that the

³ The burden of proof issue before the Court in this case, as viewed by the Amicus, primarily concerns the ultimate burden imposed on a plaintiff in a case alleging intentional discrimination. In past decisions, this Court has been careful to distinguish between that burden of proof on the ultimate question and the rules governing "the basic allocation of burdens and order of presentation of proof" in discrimination cases. *Burdine*, 450 U.S. at 252. As the Court observed in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), this latter set of legal rules notwithstanding, courts should not "treat discrimination differently from other ultimate questions of fact." 460 U.S. at 716. In discrimination cases brought under either Title VII or Section 1981, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff

arguments made by Petitioner in this case seek to shift that burden or to restrict an employer's legitimate discretion in selecting individuals for promotion, the Court should reject those arguments as being impractical and unsupported by the law.

This case involves an individual claim alleging discrimination in the denial of a promotion. In response to the evidence presented by the plaintiff, the employer offered evidence to show that it judged the person who received the promotion to be better qualified than the plaintiff. Under the standard for presentation of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the next step was for the plaintiff to offer any evidence she had to demonstrate that the legitimate nondiscriminatory reason articulated by the employer was merely a pretext for intentional discrimination. This evidence could take the form of a showing by the plaintiff that she was in fact, *more* qualified than Williamson, the person selected for the promotion. A mere showing that her qualifications were *equal* to Williamson's, however, would not suffice to meet her ultimate burden. Rather, only if the jury were convinced that the Petitioner was clearly better qualified than the person who was promoted would it have been warranted in concluding that the employer's explanation must not have been sincere.

In *Johanson v. Transportation Agency*, 107 S.Ct. 1442, 1457 n.17 (1987), this Court observed that differences in qualifications between individual candidates for promotion are sometimes minimal and may

remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

depend on subjective determinations as to which candidate is "best qualified." * Where a single opportunity for promotion is involved, logic does not suggest, and the law does not require, that an inference of discrimination be drawn from a mere showing that the plaintiff's qualifications were arguably comparable to those of the person promoted. Rather, to support a finding that the employer's proffered ex-

* To permit the plaintiff to prevail simply on the basis of a showing that she is as qualified as the person selected for the promotion would be essentially the same flawed reasoning which this Court corrected in *Texas Department of Community Affairs v. Burdick*, 450 U.S. 248 (1981). As the Court there stated:

The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U.S. at 804. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would in effect, conclude that it has discriminated.

The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex, and national origin. . . . Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). See *Stecher v. Weber*, 443 U.S. 190, 205-206 (1979). The statute was not intended to "disturb traditional management prerogatives." *Id.*, at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978).

450 U.S. at 258-59.

planation for its decision was pretextual, the evidence must compel the conclusion that the employer, in the exercise of its discretionary authority to evaluate the credentials of candidates, could not reasonably have concluded that the person selected was in fact better suited for the position than the plaintiff. In the ordinary case, this will require a showing that the plaintiff's qualifications are clearly superior to those of the person chosen.

Petitioner's arguments stress that there may be situations in which a plaintiff is unable to prove that she is more qualified than the person who was promoted, but nonetheless may be able to produce evidence of an overt policy of discrimination. As an example, Petitioner cites the airline policy at issue in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which specifically differentiated between airline captains on the basis of their age. There is no disagreement with the proposition that an overt policy of disparate treatment can constitute direct evidence of illegal discrimination. But the Petitioner's arguments in this regard miss a critical point. That is, in most cases involving allegations of discrimination in promotion there is no direct evidence of an overt discriminatory intent, but there is an assessment of the relative qualifications of the person who was promoted and a person who was not.

Indeed, the *McDonnell Douglas* formula is useful precisely because so often there is no direct evidence of discriminatory intent.⁹ In explaining how that formula works, this Court has observed that one of

⁹ See *Aikens*, 460 U.S. at 716.

the most frequent reasons for legitimately rejecting a person for a job is a relative lack of qualifications.*

This point must not be overlooked in ruling on the issue before the Court in this case. The essence of the *McDonnell Douglas* approach is that an inference of intentional discrimination may be warranted where the most common legitimate reason why an individual may be denied a particular position are lacking.

A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts

* In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court recognized that a relative lack of qualifications is one of the two most common legitimate reasons for refusing one candidate and selecting another:

The *McDonnell Douglas* formula . . . does demand that the alleged discriminator demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

431 U.S. at 228 n.41. See also, *Burdine*, 450 U.S. at 254.

only with some reason, based his decision on an impermissible consideration such as race.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

To be sure, an individual plaintiff is not limited to following the *McDonnell Douglas* formula, and that formula was never intended to be "rigid, mechanized, or ritualistic."⁷ But an individual who tries to prove intentional discrimination without addressing the most common legitimate reasons for nonselection (that is, the issues of whether there was a vacancy and whether the person chosen had superior qualifications) has taken on a very difficult burden. In such a situation, the plaintiff's effort is not pushed along by the strong force of the logic which drives the *McDonnell Douglas* formula.

In the instant case, the focus is not on the evidence needed to demonstrate a *prima facie* case (although much of Petitioner's argument is framed in those terms). Rather, the key issue here is what must be shown by a plaintiff after the employer has produced evidence that it judged the qualifications of the person selected to be superior to the plaintiff's. The Court has observed that at this stage, the presumption created by the *McDonnell Douglas* formula "drops from the case"⁸ and "the factual inquiry proceeds to a new level of specificity."⁹

In their arguments to this Court, however, Petitioner and the Department of Justice find fault with

⁷ *Furnco*, 438 U.S. at 577.

⁸ *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Burdine*, 450 U.S. at 255 n.10.

⁹ *Burdine*, 450 U.S. at 255; *Aikens*, 460 U.S. at 715.

a jury instruction which addresses the factual inquiry on this "new level of specificity," rather than the general theories available to prove a prima facie case. They seem to suggest that the court's instructions to the jury were improper because they were related to the specific factual dispute raised by the evidence in the case. They argue that a proper instruction would have advised the jury of all the various alternate theories of discrimination, without regard to the available evidence. The flaw in Petitioner's approach is not unlike the flaw pointed out by this Court in *Aikens*. In that case, the parties and the Court of Appeals continued to focus on the issue of whether the plaintiff had proven a prima facie case even after the case had been fully tried on the merits. As this Court observed;

by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *rel non*.

460 U.S. at 714. Similarly, the approach urged here by the Petitioner tends to evade rather than confront the ultimate question of intentional discrimination—i.e. the very question which the jury had to decide.

The evidence previously introduced by the plaintiff and by the defendant remains in the case, to be considered by the trier of fact on the ultimate issue of whether the plaintiff was a victim of intentional discrimination. Thus, while a plaintiff may have a variety of options for presenting evidence of a prima facie case, a plaintiff cannot ignore the issue of relative qualification once it has been raised in a promotion discrimination case. The ultimate burden of convincing a trier of fact that the employer inten-

tionally discriminated is on the plaintiff¹⁰ and a trier of fact is entitled to find against a plaintiff who fails to overcome the employer's evidence that it selected an individual it judged to be better qualified than the plaintiff.

The arguments made by the Petitioner and the Department of Justice in this case focus on the unusual rather than the typical issues raised in a claim of promotion discrimination. Any guidance provided by the Court here with respect to claims of promotion discrimination should recognize that most claims of promotion discrimination hinge on an assessment of relative qualifications. The Petitioner's focus on direct evidence must not serve to confuse the already established principle that a plaintiff whose evidence shows only that she is as qualified as the person who was promoted has not proven the existence of intentional discrimination. Moreover, even if the plaintiff offers evidence that the employer may have misjudged the relative qualifications of the individuals, that evidence alone does not create liability under Title VII or Section 1981.¹¹

In examining the Petitioner's discussion about how to assess relative qualifications, it should be noted

¹⁰ *Burdine*, 450 U.S. at 254. For an indication of the type of evidence which could support a finding of discrimination in a case which has been fully tried, see the Court's discussion in *Aikens*, 460 U.S. at 715 n.2.

¹¹ *Burdine*, 450 U.S. at 259. This same rationale applies in the context of claims alleging age discrimination in a reduction-in-force. In such cases, courts have recognized that a plaintiff who shows simply that he was a competent employee and that he was laid off when a younger employee was retained has not demonstrated discrimination. See, e.g., *LaGrout v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1090 (4th Cir. 1984) (plaintiff's subjective determination that he was

that Petitioner relies heavily upon the decision in *Hawkins v. Ashenauer-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983), to demonstrate that rulings by other courts are in conflict with the decision in this case by the Fourth Circuit. Petitioner's reading of *Hawkins*, however, goes beyond the facts of that case. In fact, a careful reading of that decision reveals that the court's conclusion that discrimination occurred was supported by a finding that plaintiff was better qualified than the person who got the job and a finding that the person who got the job did not possess the educational qualifications that the employer professed to require. Indeed, it appears the jury instructions challenged by Petitioner here would have permitted a finding of discrimination in the *Hawkins* case.¹⁰

better qualified than the worker who was retained was not enough to make a case of discrimination), and *Sakodi v. Reynolds Chemical*, 626 F.2d 1116, 1118 (8th Cir. 1980) (a plaintiff's showing that he was replaced by an equally qualified employee of a younger age is insufficient to support an inference of discrimination).

¹⁰ The job at issue in *Hawkins* was that of material control analyst, a position created during a reorganization. This new position involved the very same duties of "inventory planning, allocation and short-term forecasting" which plaintiff had been performing prior to the reorganization. The employer argued that it had chosen a person with superior qualifications. The court found, however, that the plaintiff had worked for the employer for seven years satisfactorily performing the same duties that were included in the new position, while the person chosen instead of the plaintiff had a total of only five and one-half years experience doing such work for other companies. 697 F.2d at 814. The court's analysis of the evidence indicates that the record supported a finding that plaintiff *Hawkins* was better qualified than the person who was selected. The court further found that the person who got the job did not in fact possess the type of college degree which the employer allegedly required.

B. The Court Should Reject Petitioner's Attempt to Characterize this Claim of Individual Disparate Treatment as a Pattern and Practice Case.

A central theme in the arguments made by Petitioner in this Court is that evidence of an overt policy of discrimination or evidence of a pattern or practice of discrimination shifts the burden of proof to the employer. The Petitioner purports to find support for this theory in this Court's references in *Burdine*, *Aikens* and *Thurston* to footnote 44 in the *Teamsters* decision.¹¹

Footnote 44 does not support Petitioner's argument. Rather, it specifically states that an employer's isolated decision to reject a minority applicant does not show that the rejection was racially based. It then goes on to explain the functioning of the *McDonnell Douglas* test as it is explained above. That is, that a relative lack of qualifications is one of the two most common legitimate reasons for rejecting an applicant, and that by eliminating the most common reasons for rejection, a plaintiff may create an inference of discrimination. Contrary to the Petitioner's assertion, the footnote does not discuss the suggestion that a plaintiff may shift the burden of proof to the employer by offering direct evidence of an overt policy of discrimination.

In addition, Petitioner's arguments overstate the usefulness of a "pattern" of discrimination in proving an instance of individual disparate treatment. In *McDonnell Douglas*, this Court noted the possibility that the racial composition of an employer's work force may be reflective of exclusionary practices, but added:

¹¹ The text of *Teamsters* footnote 44 is set forth in footnote 6 of this brief, at page 10, *supra*.

We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individual hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

411 U.S. at 805 n.19.

In a case involving an individual allegation of promotion discrimination, where the employer has introduced evidence of superior qualifications, the plaintiff's effort to prove pretext cannot succeed if it is not responsive to the issue of relative qualifications.

CONCLUSION

The Court of Appeals for the Fourth Circuit correctly ruled that in a case involving an allegation of promotion discrimination, where the employer has produced evidence that it relied upon the superior qualifications of the person it selected over the plaintiff, the plaintiff cannot prevail simply by relying on evidence which arguably shows that she may be as qualified as the person who received the promotion. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

—v—
MCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN
CIVIL LIBERTIES UNION FOUNDATION AND THE
NORTH CAROLINA CIVIL LIBERTIES LEGAL
FOUNDATION IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and advancing the fundamental civil rights and civil liberties of the people of the United States. The North Carolina Civil Liberties Union Legal Foundation, with more than 3,500 members, is one of its national chapters.

Central among the fundamental rights and liberties of our society is the right to be free from racial discrimination. The ACLU has been involved in numerous cases before this Court and other tribunals

^{1/} The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

involving issues related to the achievement of the fundamental right of equality, and to the advancement of antidiscrimination principles.

This case raises important issues concerning the protection afforded and the remedies available to victims of racial discrimination in employment. The significance of this case to the achievement of equal employment opportunity has prompted the ACLU to file this brief AMICI CURIAE in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the position of AMICI that claims of racial harassment in the workplace are cognizable under 42 U.S.C. §1981 ("Section 1981") as well as under Title VII of the Civil Rights Act of 1964. The court of appeals' holding to the

contrary in this case erroneously narrows the range of legal relief available to victims of racial harassment in the workplace and eviscerates the legal protections which Congress intended to extend to such victims.

The history surrounding the enactment of the Civil Rights Act of 1964 supports the conclusion that Congress intended to create an expansive remedy for victims of race discrimination. In light of the legislative history accompanying its enactment, §1981 is appropriately applied to combat racial harassment in the workplace today. As this Court has repeatedly recognized, the legislative history supports a liberal construction of the provisions of the Act. Section 1981, as interpreted by this Court, clearly encompasses allegations that an employer

has targeted a black employee for disparate, hostile treatment and has engaged in a campaign of harassment solely on account of that employee's race. The acts alleged by the petitioner in pleadings and argument below^{2/} certainly interfered with petitioner's ability to fulfill her employment contract, and deprived her of an opportunity to work in an atmosphere free of racially motivated hostility and harassment. The alleged acts undoubtedly frustrate a black employee's exercise of the rights declared in §1981.

The right to "make and enforce" contracts in a manner identical to that enjoyed by whites becomes meaningless if the court of appeals' decision that the

^{2/} See Joint Appendix at 7-9; Petitioner's Appendix to the Petition for a Writ of Certiorari at 1a-5a.

right excludes the enjoyment of a workplace free of racial harassment is allowed to stand. The decision below is inconsistent with the express intent of Congress in enacting the predecessor to the modern §1981, and conflicts with the decision of this Court and the lower federal courts. Accordingly, the decision should be vacated.

Section 1981 is an important independent means of redressing racially motivated employment discrimination. The relief available under §1981 to victims of employment discrimination is particularly appropriate relief in racial harassment cases. Amici submit that it is important to preserve the remedies available under 42 U.S.C. §1981, particularly compensatory and punitive damages, in cases of racial harassment in the workplace.

ARGUMENT

I. THE LEGISLATIVE HISTORY SURROUNDING THE ENACTMENT OF 42 U.S.C. §1981 MANIFESTS CONGRESSIONAL INTENT THAT THE ACT BE CONSTRUED LIBERALLY

Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Burnson v. McCrory, 427 U.S. 160, 168 (1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 295 (1976); Goodman v. Lukens Steel Co., 402 U.S. ___, 96 L.Ed.2d 572, 582 (1967).^{1/}

^{1/} 42 U.S.C. §1981 provides in relevant part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like penalties, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(continued...)

This Court has reviewed the legislative history of the Civil Rights Act of 1964 on several occasions and has concluded that the Civil Rights Act was intended as a broad prohibition against racial discrimination, and that it is consistent with the legislative intent to read the statute liberally. See S.H., Jones v. Alfred H. Mayer Co., 392 U.S. 409

^{1/} (...continued)

42 U.S.C. §1981 was derived from §1 of the 1866 Civil Rights Act, 14 Stat. 27, which was re-enacted with minor changes as §16 of the Civil Rights Act of 1970, 16 Stat. 144. See Burnson v. McCrory, 427 U.S. 160, 168-70 and n.8; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968).

(1968);^{4/} McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1974).^{5/}

Congress enacted the Civil Rights Act of 1866 in response to post-Emancipation legal and extra-legal efforts to oppress the freedmen, and intended the legislation to "give effect to th[e Thirteenth Amendment] and secure to all persons within the United States practical freedom."^{6/}

^{4/} "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a scope as broad as its language." 392 U.S. 409, 437 (1968) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

^{5/} "[T]he Act was meant, by its broad terms, to prescribe discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. 273, 295.

^{6/} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess. at 474) (Remarks of Senator Trumbull). See generally Comment, "Developments in the law - Section 1981," 15 Harv.C.R.-C.L.L.Rev. 33, 35-48 (1980).

In his comprehensive review of the legislative history of the 1866 Civil Rights Act in the majority opinion in Jones, supra, Justice Stewart wrote:

That the bill would indeed have . . . [a sweeping] effect was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none Thus, when the Senate passed the Civil Rights Act . . . it did so fully aware of the breadth of the measure it had approved [W]hen the House passed the Civil Rights Act . . . it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act

. . . .

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433, 435-36 (1968).

The Civil Rights Act of 1866 was drafted and introduced by Senator Trumbull shortly after the ratification of the Thirteenth Amendment to the Constitution.^{2/} Senator Trumbull stated that his proposed bill was intended to provide a "means" of "carr[ying] into effect" the "declaration" of the Thirteenth Amendment,^{3/} and would "break down all discrimination between black men and white men."^{4/} In the House of Representatives another proponent of the

^{2/} See Jones v. Alfred N. Shaw Co., 392 U.S. at 429-32.

The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amendment 13, §11 (1865). Section 2 of the Amendment authorizes congressional enforcement of the amendment by appropriate legislation.

^{3/} Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

^{4/} Cong. Globe, 39th Cong., 1st Sess. at 599.

Act, Representative Cook of Illinois, expressed particular concern about eradicating interference with the labor contracts of black workers. Representative Cook advanced the proposed Civil Rights Act as an antidote to interference with the employment rights of the freedmen:

[I]f it is competent for the . . . Legislatures of the rebel States to enact . . . laws which impair their [the freedmen's] ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts . . . then . . . of what practical value is the amendment abolishing slavery in the United States?^{10/}

Against this background, Congress enacted the Civil Rights Act of 1866 to correct a myriad of perceived evils. The legislation was intended to prohibit the various manifestations of racial

^{10/} Cong. Globe, 39th Cong., 1st Sess. 1151 (1866).

discrimination which emerged during the post-Emancipation period. As this Court observed in Jones v. Alfred N. Mayer Co.:

[Section] 1 of the Civil Rights Act of 1866 . . . was cast in sweeping terms:

[A]ll persons born in the United States and not subject to any foreign power [. . .] are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or servitude [. . .] shall have the same right, in every State and Territory of the United States, to make and enforce contracts [. . .] as is enjoyed by white citizens

392 U.S. 409, 422-23 (1968).

It is well settled that Congress intended, in enacting the Civil Rights Act of 1866, from which §1981 was derived, to impose a far-reaching prohibition against racial discrimination in various transactions and relationships including the private employer-employee

relationship.^{11/} The language of the statute is itself expansive, and was intended to be so by the Thirty-ninth Congress. Accordingly, this Court's decisions have liberally construed the statute. In light of the breadth of this legislation as drafted by Congress and construed by this Court, the restriction of its force and effect embodied in the decision below in this case is contrary to the legislative intent and should be rejected by this Court.

^{11/} In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), this Court confirmed that §1981 is "a remedy against private employment discrimination separate from and independent of . . . Title VII [of the Civil Rights Act of 1964]." 421 U.S. 454, 466. Compare 42 U.S.C. §1981 (§1 of the Civil Rights Act of 1964, re-enacted as §16 of the Civil Rights Act of 1970) with 42 U.S.C. §§2000e et seq. (Title VII of the Civil Rights Act of 1964). See also Brown v. Gregory, 427 U.S. 160, 179 (1976) (noting that U.S.C. §1981 "eliminate[s] . . . racial discrimination in the making of private employment contracts.")

II. 42 U.S.C. §1981 PROVIDES
IMPORTANT INDEPENDENT REMEDIES
FOR VICTIMS OF ALL FORMS OF
RACIALLY-MOTIVATED EMPLOYMENT
DISCRIMINATION INCLUDING RACIAL
HARASSMENT IN THE WORKPLACE

A. The Decisions Of This Court Conclu-
sively Establish That 42 U.S.C. §1981
Is An Independent And Distinct Avenue
Of Relief For Victims Of Racially
Motivated Employment Discrimination

The decision of this Court in Johnson
v. Railway Express Agency, 421 U.S. 454
(1975) conclusively established that 42
U.S.C. §1981 provides a remedy for victims
of racially motivated employment
discrimination.^{12/} In Johnson, this Court
addressed the issue of whether the statute
of limitations for filing an employment
discrimination action pursuant to Section

^{12/} "Although this Court has not specifically
so held, it is well settled among the Federal
Courts of Appeals — and we now join them — that
§1981 affords a federal remedy against
discrimination in private employment on the basis
of race." Johnson v. Railway Express Agency, 421
U.S. 454, 459-60 (1975).

1981 should be tolled during the pendency
of administrative procedures required as a
prerequisite to the initiation of an action
under Title VII of the Civil Rights Act of
1964 ("Title VII"), 42 U.S.C. §2000e et
seq. The Johnson decision affirmed the
holding of the Sixth Circuit Court of
Appeals that the timely filing of an
employment discrimination charge with the
Equal Employment Opportunity Commission,
pursuant to Title VII, does not toll the
limitation period for filing a Section 1981
action based on the same facts. Johnson v.
Railway Express Agency, 421 U.S. 454
(1975).

Justice Blackmun, writing for the
majority of the Court, reviewed the
legislative history of Title VII and
concluded that while Title VII "was enacted
'to assure equality of employment

opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin," Congress did not intend to establish Title VII as an exclusive remedy for employment discrimination.

Johnson v. Railway Express Agency, 421 U.S. 454, 457, 459 (1975) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)). This Court held that the passage of Title VII did not vitiate the remedies available to victims of racially motivated employment discrimination under other federal laws and concluded that "the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."

Johnson v. Railway Express Agency, 421 U.S. at 461.11/

This Court has reaffirmed the principle that Section 1981 is an independent and distinct avenue of relief for victims of racially motivated employment discrimination in a number of decisions since Johnson. For example, in Burns v. McCrary, 427 U.S. 160, 49 L.Ed.2d 415 (1976), a §1981 action challenging the exclusion of non-whites from private schools, the Court noted that "Congress in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered

11/ This Court noted several distinctions between §1981 and Title VII remedial provisions. Of particular relevance here, the Court noted that "[a]n individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances positive damages [a]nd a back pay award under §1981 is not restricted to the two years specified for back pay recovery under Title VII." Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial discrimination in employment." 427 U.S. 160, 174. See also Runyon, id., 427 U.S. at 174 n.11. Similarly, this Court's decision last term in Saint Francis College v. Al-Khazraji, 481 U.S. ___, 95 L.Ed.2d 582 (1987) again confirmed that §1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts," including employment contracts. 481 U.S. ___, 95 L.Ed.2d 582, 589.^{14/} Inasmuch as the

^{14/} See also McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 288 (1976) (holding in an employment discrimination case that §1981 "prohibit[s] any racial discrimination in the making and enforcement of contracts,"); Gooden v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572, 582 (1987) (holding in an employment discrimination case that §1981 "declares the

(continued...)

decision below suggests that the availability of a Title VII remedy in racial harassment cases conflicts with availability of §1981 as an avenue of relief in such cases, the decision is clearly erroneous.^{15/}

An uninterrupted line of decisions of this Court beginning with Johnson v.

^{14/} (...continued)
personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds.").

^{15/} This Court has previously rejected arguments suggesting the exclusivity of Title VII as a remedy for employment discrimination claims. See e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Arbitrator's decision not binding in Title VII actions because contractual rights under a collective bargaining agreement and rights under Title VII "have legally independent origins and are equally available to the aggrieved employee."); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (collective bargaining agreement grievance arbitration procedure and Title VII charge may be pursued concurrently, and period for filing charge of discrimination with the Equal Employment Opportunity Commission is not tolled during pendency of grievance arbitration procedure).

Railway Express Agency, supra, holds that 42 U.S.C. §1981 establishes an independent remedy for victims of racially motivated employment discrimination. Thus, this Court should reject the decision below, which suggests that the availability of a Title VII remedy somehow undermines petitioner's reliance upon §1981 to obtain relief for racial harassment.

B. This Court Has Recognized The Availability Of Relief Under 42 U.S.C. §1981 In A Variety Of Circumstances Including Racial Harassment In The Workplace

The §1981 employment discrimination cases reviewed by this Court since Johnson have involved varied factual scenarios, and presented different legal and procedural issues, but the decisions of this Court have in no instance questioned the appropriateness of reliance upon §1981

as a remedy for racially motivated employment discrimination.

The court of appeals distinguished between the "terms, conditions, or privileges of employment"^{16/} and "§1981's more narrow prohibition of discrimination in the making and enforcing of contracts." Patterson v. McLean Credit Union, 805 F.2d 1143, 1145. The court of appeals' analysis engrafts the novel requirement that the courts assess the facts of a racial discrimination claim and determine whether the acts alleged "go to the very existence and nature of the contract" before allowing the claimant to proceed with a §1981 employment discrimination. There is no support for this analysis of §1981 in this Court's decisions.

^{16/} See 42 U.S.C. §2000e-2(a).

Johnson v. Railway Express Agency,
supra, involved challenges to an employer's
discrimination "against its Negro employees
with respect to seniority rules and job
assignments," and to several labor unions'
maintenance of "racially segregated
memberships."^{17/} With these allegations
before it, this Court held that dismissal
of the §1981 claim as untimely was
appropriate. The Johnson opinion is free
of any suggestion, however, that the §1981
claim based, inter alia, upon allegations
of discriminatory seniority rules and job

^{17/} Johnson v. Railway Express Agency, 421
U.S. 454, 455 (1975).

The Court noted, however, that "[t]he
claims against the union were dismissed [below] on
res judicata grounds [and t]his issue . . .
was not included in [the Court's] grant of
certiorari." Johnson, 421 U.S. at 457 n.3.
Petitioner Johnson was fired three weeks after he
filed his EEOC charge, so he subsequently amended
his charge to include an allegation of
discriminatory termination. 421 U.S. 454, 455.

assignments was substantively defective.
From all that appears in Johnson, the only
bar to proceeding with a §1981 claim in the
case was procedural rather than
substantive.

As noted in the opinion below,^{18/}

^{18/} The court of appeals wrote:

The cases relied on by Patterson . . .
[do not] directly hold[] that racial
harassment gives rise to a discrete
claim under §1981 as distinguished from
recognizing that racial harassment may
be relevant as evidence of
discriminatory intent supporting a
cognizable claim of employment
discrimination under §1981 and that it
may give rise to a discrete Title VII
claim.

805 F.2d at 1146. The decision then
cites the district court opinion in Goodman
(reported at 580 F.Supp. 1114) with a parenthetical
explanation that the opinion "very generally
cit[ed] §1981, along with Title VII, as a basis for
a claim of racial harassment." 805 F.2d 1143,
1146. Cf. Goodman v. Lukens Steel Co., 96 L.Ed.2d
572, 584 ("[T]he unions were found to have
discriminated on racial grounds in violation of
both Title VII and §1981 in certain ways . . .
[including their] tacit encouragement of racial
harassment.").

Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572 (1987), involved a racial harassment claim. The district court in Goodman found defendants United Steelworkers Union and two local unions "guilty of discriminatory practices . . . [including] tacit[] encourag[ement of] racial harassment." 96 L.Ed.2d 572, 581. See also Goodman v. Lukens Steel Co., 580 F.Supp. 1114 (E.D.Pa. 1984). The Third Circuit "affirmed the liability judgment against the Unions."^{12/} This Court noted that the liability of the unions was founded upon "both Title VII and §1981 [violations]," and concluded that "[t]he courts below . . . properly construed and applied Title VII and §1981." Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d

^{12/} 96 L.Ed.2d 572, 581. See also Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985).

572, 587 (1987). As in Johnson, supra, this Court's decision in Goodman contrasts starkly with the analysis of the court below. There is, again, no intimation in this Court's Goodman decision that racial harassment or other claims beyond those that "go to the very existence and nature of the contract" as defined in the decision below are cognizable under Title VII but not under §1981. Indeed, this Court's affirmance of the judgment finding the unions liable for racial harassment under both Title VII and §1981 squarely conflicts with the decision below.

The court of appeals' decision in this case confining the application of §1981 to race discrimination claims which "go to the very existence and nature of the employment contract," Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir.

1986) unduly restricts the availability of the §1981 remedy for employment discrimination victims, and is contrary to the decisions of this Court, which have expressly and tacitly approved and applied §1981 in a variety of employment situations.

C. The Remedial Provisions Of 42 U.S.C. §1981 Are An Important Weapon In The Arsenal Of Legal Remedies To Combat Racial Harassment In The Workplace

Justice Marshall, in a separate opinion in Johnson v. Railway Express observed:

In recognizing that Congress intended to supply aggrieved employees with independent but related avenues of relief under Title VII of the Civil Rights Act of 1964 and §16 of the Civil Rights Act of 1870, 42 U.S.C. §1981, the Court emphasizes the importance of a full arsenal of weapons to combat unlawful employment discrimination in the private as well as the public sector." 421 U.S. 454, 468 (1975) (Marshall, J., concurring in part and dissenting in part).

The decision below effectively eliminates §1981 from the "arsenal of weapons" available to combat racial harassment in the workplace. That decision is contrary to congressional intent, the decisions of this Court, and the decisions of other federal courts. Moreover, the elimination of §1981 as a remedy against racial harassment in the workplace clearly conflicts with the national policy of eradicating racial discrimination, and will seriously hamper efforts to eliminate racial harassment in the workplace.

In his separate concurring opinion in Runyon v. McCrary, Justice Stevens wrote:

[E]ven if [the Court's decision in Jones v. Alfred H. Mayer Co.] did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.

The policy of the Nation as formulated by the Congress in

recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a liberal construction to such legislation. For the Court now to overrule Jones would be a significant step backwards . . . Such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to Jones.

Runyon, supra, 427 U.S. 160, 191 (1976) (Stevens, J., concurring).

Justice Stevens' observation that Congress has endeavored, through legislation, to eliminate race discrimination throughout our society remains true today.^{20/} This Court has similarly continued to "give[] a

^{20/} See e.g., Pub. L. No. 97-205, 96 Stat. 134 (June 29, 1982) (amendments expanding coverage of the Voting Rights Act of 1965); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986) (creating new remedy for employment discrimination on the basis of national origin or citizenship).

sympathetic and liberal construction" to Congress' antidiscrimination legislation, particularly the modern derivatives of the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982.^{21/}

The decision below retreats significantly from this legislative commitment to the eradication of race discrimination and runs counter to prevailing judicial support for legislative initiatives to achieve greater racial justice in this society.

For many persons in the workforce, the principles of equal employment opportunity

^{21/} See e.g., Saint Francis College v. Al-Khazraji, 481 U.S. ___, 95 L.Ed.2d 582 (1987) (applying §1981 to Arab's employment discrimination claim); Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 95 L.Ed.2d 594 (1987) (applying §1982 to case involving vandalism of a synagogue); Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572 (1987) (applying §1981 in case involving allegation of union acquiescence in discriminatory acts, including racial harassment).

are still aspirational. Racial harassment in the workplace is one of the lingering impediments to the achievement of equal employment opportunity.^{22/}

Racial harassment in the workplace is sometimes characterized by intransigent resistance to compliance with the antidiscrimination laws.^{23/} Occasionally

^{22/} A case before the Michigan Civil Rights Commission, Ben Citchen v. Firestone Steel Products Co., Nos. 12190-EM, 15389-EM (Michigan Civil Rights Commission 1984) is illustrative of an extreme case of racial harassment. The black complainant in that case was subjected to racial epithets, was physically segregated from white employees, and received notes containing references to the "KKK." See M. Denis, "Race Harassment Discrimination: A Problem That Won't Go Away?" 10 *Empl. Rel. L.J.* 415 - 36. According to Denis, Citchen also found "a noose . . . [and] a sign that read[] 'KKK for you, Ben,'" at his work station and discovered "a dead mouse, fishbones, and a cross soaked in kerosene burning in his locker." Denis, *id.* at 415-16. The author concludes that "Citchen is the egregious case. But in some respects it is not really an aberration. Racial harassment still exists," *id.* at 435.

^{23/} See, e.g., Claiborne v. Illinois Central (continued...)

racial harassment is manifested through conduct which can only be described as egregious.^{24/} Finally, in some instances

^{23/} (...continued)
R.R., 583 F.2d 143, 154 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979) (affirming trial court's award of \$50,000 in punitive damages in Title VII and §1981 action on ground that "[t]he railroad's intransigence in failing . . . to redress any of its prior discriminatory acts, plus its additional acts of post [1964 Civil Rights] Act discrimination, such as testing only black helpers to evaluate their asserted 'deficiencies,' supports the [trial] court's view that the defendant acted with malice with respect to its black employees.").

^{24/} See e.g., Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981). In *Taylor*, the court of appeals affirmed a trial court's award of relief under 42 U.S.C. §1981 to a victim of racial harassment. The appeals court held that "ample evidence in the record . . . support[ed] the district court's finding that the racial atmosphere of [plaintiff's workplace] was 'dismal,'" and characterized the conditions existing in the worksite of plaintiff's former employer as a "pervasive atmosphere of prejudice." 653 F.2d 1193, 1199. The appeals court "recite[d] some of the overwhelming evidence relating to the 'dismal' racial atmosphere" in plaintiff's former place of employment, including evidence that racial slurs and epithets were frequently used in the workplace; testimony about an incident in which an employee notorious for his claimed affiliation with the Ku Klux Klan displayed a noose in the supply room; evidence that the

(continued...)

racial harassment involves repeated interference with opportunities for advancement, or other, more subtle manifestations of racial animus.^{24/}

^{24/} (...continued)
physically demanding position of mail clerk was filled almost exclusively by black employees; and testimony from the plaintiff that "racially offensive jokes" were told in her presence during her employment with defendant. *Id.*, at 1198-99. See also *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (plaintiff subjected to, *inter alia*, racial epithets, derogatory graffiti, and coworkers tampering with his equipment awarded punitive and compensatory damages in Title VII and §1981 action).

^{25/} For example, in *Williamson v. Hardy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987) the court affirmed an award of punitive and compensatory damages to Title VII and §1981 plaintiff who was repeatedly denied promotions, and witnessed white employees with less seniority promoted above her over the course of eight years. After plaintiff filed a charge of discrimination with the EEOC, her supervisor placed a document in plaintiff's personnel file regarding her use of vacation time. Subsequently, plaintiff's supervisor "berated" her for using a particular washroom facility, and plaintiff suffered a nervous breakdown shortly after this confrontation. 817 F.2d 1290, 1292-93. The court of appeals observed that "none of these events involved racial epithets, and the employer offered neutral
(continued...)

Nevertheless racial harassment --- whether sophisticated or crude--- impedes the achievement of equal employment opportunity.^{26/} It is important to

^{25/} (...continued)
explanations for each. But once a jury decides that an employer makes use of race in its everyday decisions -- in this case, that it held Williamson's race against her over a decade -- it is permissible to infer that race also explains other disparate treatment." 817 F.2d at 1295.

^{26/} In *McCrary v. Rayon*, 515 F.2d 1082 (4th Cir. 1975) the court wrote:

Section 1981 doubtless was intended to give the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma which accompanied the disabilities under which they had formerly labored. The plain command of the statute is that those enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of these statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences.

515 F.2d 1082, 1089, *aff'd Rayon v. McCrary*, 427 U.S. 160 (1976).

(continued...)

preserve a broad range of remedies to address this persistent and troubling phenomenon.

In appropriate cases, the remedies and procedures available under 42 U.S.C. §1981^{27/} are a valuable means of

^{26/} (...continued)

Assessment of a racial harassment claim necessarily involves the exercise of discretion by the trier of fact. However, it is important, as many lower courts have recognized, to be sensitive to forms of employment discrimination which, while more subtle than the behavior recounted in cases such as *Taylor*, *supra*, nevertheless constitute "treatment of the victim as being subject to th[e] . . . disabilities [of slavery]." *McCrory*, *id.* See *q.d.*, *Lowery v. WNC-TV*, 658 F.Supp. 1240 (W.D. Tenn. 1987), *vacated on other grounds*, 661 F.Supp. 65 (W.D. Tenn. 1987).

^{27/} This Court has observed that "[t]he remedies available under Title VII of the Civil Rights Act of 1964 and under Section 1981 . . . augment each other and are not mutually exclusive." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). Compensatory and punitive damages, as well as equitable remedies, are available to a prevailing §1981 plaintiff. *Id.* at 460. In addition, the lower courts have allowed jury trials in §1981 actions since legal as well as equitable remedies are available in such actions. Cf. *Curtis v. Loether*, 415 U.S. 189 (1974) (holding that jury trial is available in 42 U.S.C. §1982 actions). See generally Comment, "Developments in the Law - Section 1981," 15 *Harv.Civ.R.-Civ.L.L.Rev.* at 246-50.

(continued...)

providing complete relief to victims of racial harassment and deterring the degrading and debilitating phenomenon of racial harassment in the workplace.

The decision below shrinks the "arsenal of weapons" available to combat racial harassment in the workplace. In light of the legislative history, judicial decisions, and public policy which squarely conflict with this result, the decision below should be reversed by this Court.

^{27/} (...continued)

trial is available in 42 U.S.C. §1982 actions). See generally Comment, "Developments in the Law - Section 1981," 15 *Harv.Civ.R.-Civ.L.L.Rev.* at 246-50.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Dated: December 3, 1987

SUPREME COURT OF THE UNITED STATES

Na. 87-187

BRENDA PATTERSON, PETITIONER *v.*
MCLEAN CREDIT UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[April 25, 1988]

This case is restored to the calendar for reargument. The parties are requested to brief and argue the following question:

"Whether or not the interpretation of 42 U. S. C. § 1981 adopted by this Court in *Rançon v. McCrury*, 427 U. S. 160 (1976), should be reconsidered?"

PER CURIAM.

One might think from the dissents of our colleagues from the above order that our decision to hear argument as to whether the decision in *Rançon v. McCrury*, 427 U. S. 160 (1976), should be reconsidered is a "first" in the history of the Court. One would also think from the language of the dissents that we have decided today to overrule *Rançon v. McCrury*. We have of course done no such thing, but have decided, in light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U. S. C. § 1981, to consider whether *Rançon* should be overruled. It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled.

Three Terms ago, for example, we requested the parties to reargue the validity of our decision in *National League of Cities v. Usery*, 426 U. S. 833 (1976). *Garcia v. San Anto-*

nio Metropolitan Transit Authority, 468 U. S. 1213 (1984) (ordering reargument), 469 U. S. 528 (1985) (decision). Two Terms before that we requested the parties to reargue and brief the question whether the Fourth Amendment exclusionary rule should apply where the evidence was obtained reasonably and in good faith. *Illinois v. Gates*, 459 U. S. 1028 (1982) (ordering reargument), 462 U. S. 213 (1983) (decision). In 1975, we ordered the parties in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U. S. 1005 (1975) (ordering reargument), 425 U. S. 682 (1976) (decision), to address whether we should reconsider our holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 439 (1964), which had reaffirmed the Court's adherence to the "act of state" doctrine. And in *Benton v. Maryland*, 393 U. S. 954 (1968) (ordering reargument), 395 U. S. 784 (1969) (decision), the Court requested reargument on the question of whether the "concurrent sentence doctrine" had continuing validity.

In addition, we have explicitly overruled statutory precedents in a host of cases. See, e.g., *Monell v. New York City Department of Social Services*, 436 U. S. 658 (1978), overruling *Monroe v. Pape*, 365 U. S. 167 (1961); *Continental T. V., Inc. v. GTE Sylvania*, 433 U. S. 36 (1977), overruling *United States v. Arnold, Schurinn & Co.*, 388 U. S. 365 (1967); *Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U. S. 132 (1976), overruling *Auto Workers v. Wisconsin Employment Relations Bd.*, 336 U. S. 245 (1949); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U. S. 484 (1973), overruling *Ahrens v. Clark*, 335 U. S. 188 (1948); *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 320 (1972), overruling *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941); *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962); *Peyton v. Rowe*, 391 U. S. 54 (1968), overruling *McNally v. Hill*, 293 U. S. 131 (1934). These actions do not mean that the Court has been insensitive to considerations of *stare decisis*, but only that we recognize it as "a principle of

policy and not a mechanical formula," *Boys Markets, supra*, at 241 (quoting *Helvering v. Hallock*, 309 U. S. 106, 119 (1940) (Frankfurter, J.)).

Both of the dissents intimate that the statutory question involved in *Ramsey v. McCrory* should not be subject to the same principles of *stare decisis* as other decisions because it benefited civil rights plaintiffs by expanding liability under the statute. We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extralegal criteria. We think this is what Congress meant when it required each Justice or judge of the United States to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich. . . ." 28 U. S. C. §453.

SUPREME COURT OF THE UNITED STATES

No. 87-107

BRENDA PATTERSON, PETITIONER *v.*
McLEAN CREDIT UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[April 25, 1988]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

The Court today asks the parties to rebrief and reargue this case, focusing not on some neglected subtlety of the issues presented for review or on any overlooked jurisdictional detail, but on a question not presented: Whether the Court should reconsider its 7-2 opinion (WHITE and REHNQUIST, JJ., dissenting) in *Ranjon v. McCrary*, 427 U. S. 160 (1976). The Court's determination now to reach out to reconsider that prior decision and everything that has been built upon it, is neither restrained, nor judicious, nor consistent with the accepted doctrine of *stare decisis*. See, e. g., *Vasquez v. Hillery*, 474 U. S. 254, 266 (1986) ("[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained," quoting *Barnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)).

Twelve years ago, consistently with our prior decisions in *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U. S. 431 (1973); and *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975), we observed that it is "well established" that 42 U. S. C. § 1981 "prohibits racial discrimination in the

making and enforcement of private contracts." *Rumson v. McCrory*, 427 U. S., at 168. We reaffirmed our reading of the legislative history and language of the statute as reaching private acts of racial discrimination, and emphasized that in the years since *Jones*, Congress specifically had considered and rejected legislation to override our interpretation of the Civil Rights Act of 1966, 14 Stat. 27, on which § 1981 is based. 470 U. S., at 174 and n. 11. Writing for the Court, Justice Stewart noted:

"There could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination. . . . In these circumstances there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes." *Id.*, at 174-175 (emphasis in original).

See also *id.*, at 186-187 (Powell, J., concurring); *id.*, at 189-192 (STEVENS, J., concurring); *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736 (1977) ("We must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation" (WHITE, J., writing for the Court)).

We continually have endorsed, in the employment and other contexts, *Rumson's* interpretation that § 1981 reaches private conduct. See, e. g., *Goodman v. Lukens Steel Co.*, 482 U. S. — (1987); *Saint Francis College v. Al-Kharaji*, 481 U. S. — (1987); *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982). See also *Memphis v. Greene*, 451 U. S. 100 (1981). Over 100 lower court opinions cite the relevant portions of *Rumson* and its progeny. The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this statutory matter in light of *Rumson* and subsequent cases. I see no reason whatsoever for the Court deliberately to reach out in the manner it does today.

Although it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes, it may be that racial discrimination in certain other contexts is not actionable independently of § 1981. I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law.

I dissent.

SUPREME COURT OF THE UNITED STATES

No. 87-107

BRENDA PATTERSON, PETITIONER *v.*
MCLEAN CREDIT UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[Argued May 15, 1988]

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

While I join JUSTICE BLACKMUN's dissenting opinion, I write separately to emphasize those aspects of the Court's action today that I believe render the order particularly ill-advised.

The Court's spontaneous decision to reexamine our holding in *Ranney v. McCrory*, 427 U. S. 160 (1976), is certain to engender widespread concern in those segments of our population that must rely on a federal rule of law as a protection against invidious private discrimination. Although the present case involves a claim of discrimination in the workplace, an area of the law where there is substantial overlap between 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e et seq., a re-examination of the issue of statutory construction decided in *Ranney* implicates a much broader sphere of conduct. *Ranney* itself did not involve a claim of employment discrimination, but the question "whether . . . 42 U. S. C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes." 427 U. S., at 163. The Court's order today will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the "same right" as "white

citizens.* To recognize an equality right—a right that 12 years ago we thought “well established”—and then to declare unceremoniously that perhaps we were wrong and had better reconsider our prior judgment, is to replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege. Time alone will tell whether the erosion in faith is unnecessarily precipitous, but in the meantime, some of the harm that will flow from today’s order may never be completely undone.

In addition to the impact of today’s decision on the faith of victims of racial discrimination in a stable construction of the civil rights laws, the order must also have a detrimental and enduring impact on the public’s perception of the Court as an impartial adjudicator of cases and controversies brought to us for decision by lawyers representing adverse interests in contested litigation. The parties have asked us to decide whether § 1981 encompasses “a claim for racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race.” Pet. for Cert. i. Neither the parties nor the Solicitor General have argued that *Rumpo* should be reconsidered.

As I have said before, “the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.” *New Jersey v. T. L. O.*, 468 U. S. 1214, 1216 (1984) (dissenting from order directing reargument). If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation—and for the future

*Section 1981 provides:

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

of this Court as an institution—will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious—and unwise—wound upon itself today.

No. 87-107-CFX
Status: GRANTED

Title: Brenda Patterson, Petitioner
v.
McLean Credit Union

Docketed:
July 17, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Balston, Charles Stephen, Hair, Fenda

Counsel for respondent: Davis Jr., H. Lee, Kaplan, Roger S.

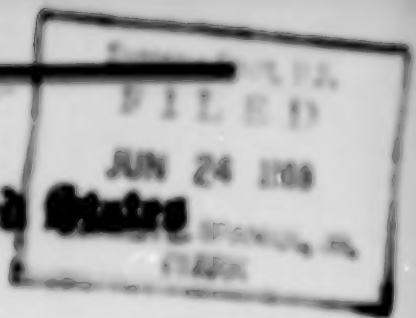
NOTE* Ext. of time 4/5/87 granted to & incl. 7/17/87
by CJ, Cited

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | Jun 3 1987 | | Application for extension of time to file petition and order granting same until July 17, 1987 (Chief Justice, June 5, 1987). |
| 2 | Jul 17 1987 | G | Petition for writ of certiorari filed. |
| 3 | Aug 14 1987 | | Brief of respondent McLean Credit Union in opposition filed. |
| 4 | Aug 19 1987 | | DISTRIBUTED. September 28, 1987 |
| 5 | Sep 5 1987 | X | Reply brief of petitioner Brenda Patterson filed. |
| 6 | Oct 5 1987 | | Petition GRANTED. ***** |
| 7 | Nov 16 1987 | | Joint appendix filed. |
| 9 | Nov 17 1987 | | Order extending time to file brief of petitioner on the merits until December 3, 1987. |
| 10 | Dec 3 1987 | | Brief amicus curiae of United States filed. |
| 11 | Dec 3 1987 | | Brief of petitioner Brenda Patterson filed. |
| 12 | Dec 3 1987 | | Brief amici curiae of ACLU, et al. filed. |
| 13 | Dec 21 1987 | | Record filed. |
| | | * | Certified copy of original record and C.A. proceedings, 8 volumes, received. |
| 15 | Dec 29 1987 | | Order extending time to file brief of respondent on the merits until January 16, 1988. |
| 16 | Jan 5 1988 | | SET FOR ARGUMENT. Monday, February 29, 1988. (2nd Case). (1 hour). |
| 17 | Jan 12 1988 | | Brief of respondent McLean Credit Union filed. |
| 18 | Jan 14 1988 | | CIRCULATED. |
| 19 | Jan 15 1988 | X | Brief amicus curiae of Equal Employment Advisory Council filed. |
| 20 | Feb 11 1988 | X | Reply brief of petitioner Brenda Patterson filed. |
| 21 | Feb 29 1988 | | ARGUED. |
| 22 | Apr 25 1988 | | This case is restored to the calendar for reargument. The parties are requested to brief and argue the following question: "Whether or not the interpretation of 42 U.S.C. Section 1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered." PER CURIAM OPINION. Dissenting opinion by Justice Blackmun, with whom Justice Brennan, Justice Marshall and Justice Stevens join. Dissenting opinion by Justice Stevens with whom Justice Brennan, Justice Marshall and Justice Blackmun join. |
| 24 | Apr 27 1988 | | Order extending time to file brief of petitioner on the |

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 25 | Jun 9 1988 | | merits until June 24, 1988. Application (A-944) for leave to file a merits brief in excess of the page limitation, and order granting same by Behnquist, C.J., on June 14, 1988. Brief not to exceed 135 pages. |
| 26 | Jun 24 1988 | | Brief amici curiae of Carol L. Bisherat, et al. filed. |
| 27 | Jun 24 1988 | | Brief amici curiae of 66 Members of the US Senate and 118 Members of the House filed. |
| 28 | Jun 24 1988 | G | Motion of American Bar Association for leave to file a brief as amicus curiae filed. |
| 29 | Jun 24 1988 | | Brief amici curiae of Curtis and Sandy McCrary filed. |
| 30 | Jun 24 1988 | | Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed. |
| 31 | Jun 24 1988 | | Brief amici curiae of Center for Constitutional Rights, et al. filed. |
| 32 | Jun 24 1988 | | Brief amici curiae of Eric Foner, et al. filed. |
| 33 | Jun 24 1988 | | Brief amici curiae of Assn. of the Bar of the City of New York, et al. filed. |
| 34 | Jun 24 1988 | | Brief amici curiae of New York, et al. filed. |
| 35 | Jun 24 1988 | | Brief of petitioner Brenda Patterson filed. |
| 36 | Jun 27 1988 | G | Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae, out of time filed. |
| 38 | Jun 30 1988 | | Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae, out of time GRANTED. |
| 40 | Jun 30 1988 | | Order extending time to file brief of respondent on the merits until August 13, 1988. |
| 42 | Jul 7 1988 | | Opposition of respondent to motion of American Bar Association for leave to file a brief as amicus curiae filed. |
| 46 | Jul 13 1988 | G | Motion of Members of the United States Senate, et al. for leave to add 27 members of the United States House of Representatives to the amici curiae brief filed. |
| 43 | Jul 15 1988 | | Set for reargument. Wednesday, October 12, 1988. (1st case) (1 hr.) |
| 44 | Jul 15 1988 | | Reply memorandum of the American Bar Association in support of its motion for leave to file a brief as amicus curiae supporting petitioner. |
| 45 | Jul 29 1988 | G | Application (A88-90) by Respondent to file a in excess of page limits, submitted to the Chief Justice. |
| 47 | Aug 3 1988 | | Application (A88-90) granted by the Chief Justice, allowing a maximum of 130 pages. |
| 48 | Aug 10 1988 | | CIRCULATED. |
| 49 | Aug 10 1988 | D | Application (A88-119) by Washington Legal Foundation, et al to file a brief as amici curiae on reargument in excess of page limits, submitted to The Chief Justice. |
| 50 | Aug 11 1988 | | Application (A88-119) denied by the Chief Justice. |
| 51 | Aug 12 1988 | X | Brief amicus curiae of Center for Civil Rights filed. |
| 52 | Aug 12 1988 | | Brief amicus curiae of Equal Employment Advisory Council filed. |
| 54 | Aug 12 1988 | X | Brief amici curiae of Washington Legal Foundation, et al. filed. |

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 53 | Aug 13 1988 | X | Brief of respondent filed. |
| 55 | Aug 13 1988 | X | Brief amicus curiae of J. Philip Anderogy filed. |
| 57 | Sep 12 1988 | X | Reply brief of petitioner Brenda Patterson filed. |
| 58 | Sep 15 1988 | | Motion of American Bar Association for leave to file a brief as amicus curiae GRANTED. |
| 59 | Sep 15 1988 | | Motion of Members of the United States Senate, et al. for leave to add 27 members of the United States House of Representatives to the amici curiae brief GRANTED. |
| 60 | Oct 12 1988 | | REARGUED. |

IN THE
Supreme Court of the United States
OCTOBER TERM, 1967



BARBARA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER ON REARGUMENT

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QUESTION PRESENTED

Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in Ramton v. McCrary, 427 U.S. 160 (1976), should be reconsidered?

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No. 87-107

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER ON REARGUMENT

CITATIONS TO OPINIONS BELOW

Petitioner incorporates by reference the citations
to opinions below set out in her Brief on the Merits.

JURISDICTION

Petitioner incorporates by reference the section on

jurisdiction set out in her Brief on the Merits.

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner incorporates by reference the statement of the case set out in her Brief on the Merits.

SUMMARY OF ARGUMENT

I. Both § 1981 and § 1982 derive from the Civil Rights Act of 1866. When the actual Revisers' Note for the 1874 codification is examined, it is clear that the Congress did not intend to repeal that part of the 1866 Act that contained what is now § 1981 and that, to the contrary, the Revisers cited judicial interpretations of the 1866 Act.

II. When Congress passed the Civil Rights Act of 1866 it was concerned with, and intended to prohibit, all actions both public and private that might lead to the effective reintroduction of slavery or peonage. Congress was aware of various schemes and devices of private parties to deny blacks the equal right to contract with regard to their labor. Therefore, § 1981 had as a central purpose the guaranteeing of the right to contract free of racial discrimination by private persons.

III. Congress has both ratified and adopted this Court's

holding that §§ 1981 and 1982 prohibit discrimination by private parties. When it passed the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Equal Employment Opportunities Act of 1972, Congress rejected repeated attempts to eliminate the Reconstruction statutes as alternative remedies for private discrimination. When it passed the Civil Rights Attorneys' Fees Act of 1976, Congress endorsed this Court's decisions in Johnson v. Railway Express Agency and McDonald v. Santa Fe and amended a companion statute for the specific purpose of permitting the recovery of attorneys' fees in cases against private as well as public defendants brought under §§ 1981 and 1982.

IV. The doctrine of stare decisis militates against the overruling of Ramton and McDonald. None of the factors that would lead to ignoring the doctrine apply in this case. To the contrary, since Ramton and its progeny involve statutory construction and since it is clear that

Congress approves that construction, those same factors are overwhelmingly in favor of adhering to the doctrine in this case and letting the decision in Ramton stand.

ARGUMENT

I.

SECTION 1981, AS WELL AS § 1982, DERIVES FROM § 1 OF THE 1866 CIVIL RIGHTS ACT

In Jones v. Mayer Co., 392 U.S. 409 (1968), the Court held that 42 U.S.C. § 1982 extends to wholly private discrimination. The Jones ruling was based on the legislative history of § 1 of the Civil Rights Act of 1866, from which § 1982 is derived. In Ramton v. McCray, 427 U.S. 160, 169 & n.8 (1976), the Court held that § 1981, as well as 1982, derives from § 1 of the Civil Rights Act of 1866. The dissenting opinion in Ramton urged that § 1981 derives solely from § 16 of the Voting Rights Act of 1870.

Section 1 of the 1866 Act was explicitly reenacted as § 18 of the Voting Rights Act of 1870, which also included, in § 16, other language similar to § 1 of the 1866 Act. In 1874, all then-existing federal laws were incorporated by Congress into a Revised Code. Sections 1981 and 1982 are identical to §§ 1977 and 1978, respectively, of the Revised Code of 1874. According to the *Rumson* dissent, a significant part of § 1 of the 1866 Act, as reenacted by § 18 of the 1870 Act, simply disappeared when the Revised Code was enacted in 1874. The dissent in *Rumson* was premised on the assumption that when Congress in 1874 enacted the predecessor of § 1981, § 1977 of the Revised Code of 1874, it had before it and relied on a "Revisers' unambiguous note that the section derived solely from" § 16 of the Voting Rights Act of 1870. 427 U.S. at 195 n.6. This assumption regarding the content of the revisers' notes was incorrect.

The dissenting opinion in *Rumson* apparently relied

upon the note printed alongside § 1977 (§ 1981) in the 1874 Revised Code. That note reads:

Equal rights under the law.

31 May, 1870, c. 114,

§. 16, v. 16, p. 144¹

This is, indeed, a reference only to the Voting Rights Act of 1870, but the notes printed in the Code of 1874 were not those written by the revisers themselves. Rather, the annotations found in the printed Revised Code of 1874 were actually written and published after the passage of the law itself, pursuant to a contract between the Secretary of State and the publishing firm of Little, Brown and Company.² It is unclear whether the notes in question were prepared at the direction of the Secretary or by an employee of the publisher.

The revision of the federal statutes was originally

¹ Revised Code of 1874, p. 348 (1875).

² See 18 Stat. 113 (1874).

authorized by an 1866 law which created a commission for that purpose. The Commissioners were authorized not only to compile existing law, but to make "such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." 16 Stat. 74-75. The Commissioners were directed to point Congress to the derivation of each provision in two ways, referring either to "the original text from which each section is compiled" or "to the decisions of the federal courts, explaining or expounding same." *Id.* at 75. When in 1872 the Commissioners presented their report to Congress, the inclusion in their draft of "alterations" in the law -- although originally authorized by the 1866 statute -- proved to be a legislative nightmare. Congress quickly concluded that it would be "utterly impossible to carry the measure" if it were understood to contain any alterations whatever in existing law. 2 Cong. Rec. 646 (1874).

Accordingly a second reviser, Thomas Jefferson Durant, was engaged to prepare a new draft. Durant was instructed to compare the Commissioners' draft with the original laws enacted by Congress, and to undo any alterations in existing law that had been made by the Commissioners. 2 Cong. Rec. 646-650 (1874); *see* 17 Stat. 579. Durant's draft and report were presented to Congress in 1873.

The Commissioners' 1872 note to § 1977, unlike the Revised Code annotation, is not limited to the 1870 Voting Rights Act. The Commissioners' note reads:

Equal rights under the law

31 May, 1870 - ch. 114,

§ 15, vol. 16, p. 144

1 Abb. U.S. 28, 84, 588¹

The last line refers to three lower court opinions printed

¹ Revision of the United States Statutes as Drafted by the Commissioners Appointed for That Purpose, v. 1, p. 83 (1872) (Library of Congress No. "SF 30.137").

in Abbott's Reports. Two of these opinions "explain and expound," not the 1870 Voting Rights Act, but § 1 of the Civil Rights Act of 1866. Matter of Turner, 24 Fed. Cas. 337, 1 Abb. 84 (1867); United States v. Rhodes, 27 Fed. Cas. 785, 1 Abb. 28 (1866).⁵ Insofar as Congress relied on the Commissioners' notes to determine the source of section 1977, it would necessarily have concluded that that section derived both from the 1866 Civil Rights Act and the 1870 Voting Rights Act.

Durant's 1873 report would undoubtedly have led Congress to the same conclusion. Durant's draft of the revised code did not include any side notes regarding the

⁵ Turner is of particular interest because it was a civil action brought against a private white employer by a black apprentice; the apprentice complained that the employer had violated her rights under § 1 by failing to include in his contract of indenture various provisions required by state law in the case of a white apprentice, such as a guarantee that the apprentice would be taught to read. Chief Justice Chase, sitting as circuit justice, concluded that "the indenture ... is ... in contravention of ... the first section of the civil rights law enacted by Congress on April 9, 1866." 24 Fed. Cas. at 338.

derivation of particular provisions.⁶ Durant's silence as to the particular origin of § 1977 could not have led Congress to believe that that section of his draft was a tacit repeal of part of the 1866 Act. Durant's introduction to his draft expressly assured Congress that no such repeals were worked by his draft:

Every section reported by the commissioners has been compared with the text of the corresponding act or portion of the act of Congress referred to, and wherever it has been found that a section contained any departure from the meaning of Congress as expressed in the Statutes at Large, such change has been made as was necessary to restore the original signification.⁶

Durant's assurance that his version of the revised code would result in no change in the law was constantly reiterated by the sponsors of the bill, and was clearly

⁶ United Report, Library of Congress No. "Law U.S. 2, LLRBB" (rare book room), p. 432.

⁶ Report of Thomas Jefferson Durant to the Joint Committee on the Progress of Work Revising the Statutes of the United States, p. 1 (Library of Congress No. "Americana 7," Durant (rare book room)).

critical to its passage.⁷

That assurance was specifically reiterated on the floor of the House with regard to the civil rights provisions of the revised code. Representative Lawrence advised his colleagues that the bill was framed to

brin[g] 'together all statutes and parts of statutes which from similarity of subject ought to be brought together'— The plan — is to collate in one title of 'civil rights' the statutes which declare them.⁸

Lawrence then referred the House to the specific provisions of the 1866 Civil Rights Act and 1870 Voting Rights Act. He read into the record the language of § 1 of the 1866 Act, and commented that § 16 of the 1870 Act 're-enacts in modified words the substance of the

⁷ 2 Cong. Rec. 647 (Rep. Dawes; "What we want is to reproduce the law as it is") (Rep. Poland; bill is "free from any effort to change existing law"), 648 (Rep. Poland; bill is "a reflex of existing statutes") (Rep. Hour; bill will "codify existing laws, and nothing more — there is no change in the existing law;" bill "does not change existing law — even though the difference be only — the difference between commas and a semicolon"), 649 (Rep. Hour; bill "contains no alteration of the law").

⁸ 2 Cong. Rec. 82 (emphasis added).

original civil-rights section.⁹ He then assured Congress that "in the reported draft of the commissioners, as in Durant's revision, the act of May 31, 1870, is very properly not treated as a revision of the whole subject, and hence as superseding the entire original act."¹⁰

Lawrence pointed to the treatment of civil rights as a "fair specimen" of Durant's work in codifying without altering the law, and insisted "from these all can judge of the accuracy of the translation."¹¹ Viewed in light of these circumstances, because § 1 of the 1866 Civil Rights Act extends to private acts of discrimination, § 1981 does so as well.

⁹ 14.

¹⁰ 14, at 828 (emphasis added).

¹¹ 14.

II.

CONGRESS INTENDED SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866 TO BAR ALL RACIAL DISCRIMINATION, BOTH PUBLIC AND PRIVATE

The actions of Congress in enacting §§ 1981 and 1982 must be examined in light of the historical conditions in 1866, at the close of a bloody conflict fought to end slavery. When viewed in its entirety, the legislative history of what was to become §§ 1981 and 1982 makes it clear that Congress was attempting to pass comprehensive legislation that would outlaw all forms of discrimination or other attempts to subjugate the former slaves, whatever the source of those attempts. Some actions that these provisions sought to interdict were the official acts of various states. Many other actions, which Congress was equally intent upon prohibiting, were those of private parties who were seeking to reintroduce slavery by every means available to them.

A. In the Area of Contract and Property Rights, the Problems that Congress Intended to Remedy Were Largely Caused by Private Action.

When Congress first reconvened after the end of the Civil War, the facts concerning conditions in the southern states, particularly the treatment of the freedmen, were in dispute. By this time, major differences were beginning to emerge between President Johnson and many of the Republican leaders in Congress. In this climate, Congress made efforts to determine for itself the truth concerning the condition of freedmen. The information thus obtained -- from the Schurz Report, the hearings of the Joint Committee on Reconstruction and letters and petitions addressed to Congress -- identified the problems that the Civil Rights Act of 1866 was designed to remedy. Examination of the information upon which Congress acted demonstrates that, with regard to contract and property rights, the primary difficulties facing freedmen stemmed from the actions of private

individuals, not state legislatures and officials.

1. The Schurz, Howard and Grant Reports.

a. The Schurz Report. The pivotal event in the origin of congressional reconstruction policy, and in the drafting by Senator Trumbull of the 1866 Civil Rights Act, was the report of Major General Carl Schurz on conditions in the South following the end of the war.¹² In June of 1865, "President Johnson assigned Schurz the task of traveling through a number of Southern States for the purpose of gathering information and making observations as to the postwar conditions to be found in that region." *Mumfria v. Greene*, 451 U.S. 100, 131 n.4 (1981) (White, J., concurring). In November 1865 Schurz completed his report, but President Johnson declined to release the report until the Senate adopted a resolution

¹² Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi and Louisiana, S. Exec. Doc. No. 2, 39th Cong., 1st Sess.

insisting that it be made public.¹³

When the Schurz report was finally released to the Senate on December 19, 1865, Senator Sumner demanded that the entire report be read aloud on the floor, denouncing as a "white-wash" President Johnson's benign account of conditions in the South. *Cong. Globe*, 39th Cong., 1st Sess. 79. After the introductory paragraphs of the Schurz report had been read as requested, Senator Trumbull urged the Senate to defer further debate on the accuracy of the President's representations until the Senate had had sufficient time to read and understand the Schurz report itself, and joined in a motion to direct that the entire report be printed.¹⁴

Congress recessed for the holiday on December 21,

¹³ *Cong. Globe*, 39th Cong., 1st Sess. 30, 78. See J. James, *The Framing of the Fourteenth Amendment* 19 (1950).

¹⁴ *Id.* at 80. Senator Sherman, in successfully urging that the Schurz report be printed, argued: "I have no doubt whatever that the report of General Schurz is a very able, elaborate, and excellent document; I have no doubt we shall be advised and informed when we read it..." *Id.* at 79.

but the Schurz report, having finally been released, played a key role in shaping public opinion.¹⁵ To assure that the Schurz Report was widely disseminated and read, Congress ordered the printing of 10,000 additional copies.¹⁶

General Schurz' grim account of conditions in the South stood in stark contrast with the benign description that had been offered by President Johnson. Schurz reported that southern whites, far from accepting the victory of the union forces and the emancipation proclamation, were almost universally determined to reintroduce some form of slavery, and had already taken a variety of steps to achieve that end. In discussions with Schurz, white southerners insisted:

[i]n at least nineteen cases of twenty ... "you cannot make the negro work without physical compulsion." I heard this hundreds of times, heard it wherever I went, heard it in nearly the same words from so

¹⁵ J. James, at 50-51.

¹⁶ Cong. Globe, 39th Cong., 1st Sess. 265.

many different people that at last I came to the conclusion that this is the prevailing sentiment among the southern people.

S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 16. That "widely spread ... and ... deeply rooted" prejudice

naturally produced a desire to preserve slavery in its original form as much and as long as possible ... or to introduce into the new system that element of physical compulsion that would make the negro work.

Id. at 17. That attitude was compounded by a general belief among whites that "the negro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way." *Id.* at 21 (emphasis in original). In the absence of federal intervention, Schurz warned, those two beliefs

will tend to produce a system of coercion, the enforcement of which will be aided by the hostile feeling against the negro now prevailing among the whites, and by the general spirit of violence which in the south was fostered by the influence slavery exercised upon the popular character.

Id. at 32. The former slave owners, Schurz predicted in an italicized passage, would devise schemes for the reintroduction of practical slavery, "the introduction of which will be attempted." *Id.* (emphasis in original).

There was, of course, no practical reason why the coercion and slavery-like working conditions favored by whites could be imposed only through legislation or actions by state officials. Schurz reported that widespread efforts to re-enslave the freedmen were being made by private citizens. The majority opinion in *Jones v. Mayer Co.* noted that the Schurz report referred to lawless acts of brutality directed against blacks. 392 U.S. at 428-29. These were not random acts of racially motivated violence but, according to Schurz, an effort to prevent blacks from exercising the rights of freedmen:

In many instances negroes who walked away from plantations ... were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction. A large

proportion of the many acts of violence committed is undoubtedly attributable to this motive.

S. Exec. Doc. No. 2, at 17. For example, General Swayne, the Freedmen's Bureau assistant commissioner in Alabama, reported

The bewildered and terrified freedmen know not what to do -- to leave is death; to remain is to suffer the increased burden imposed upon them by the cruel taskmaster, whose only interest is their labor, wrung from them by every device an inhuman ingenuity can devise; hence the lash and murder is resorted to intimidate those whom fear of an awful death alone cause to remain, while patrols, negro dogs and spies, disguised as Yankees, keep constant guard over these unfortunate people.

Id. ¹⁰ See also *id.* at 18 (Georgia), 19 (Mississippi).

Whether former slaves remained with their old masters or succeeded in finding work with another land owner, they were likely to be subject to abuse by their employers, who often imposed on them conditions as bad or even worse than slavery itself.

[M]any attempts were made to ... adher[e], as to the treatment of laborers, as much as possible to the traditions of the old system, even where the relations between employers and laborers had been

fixed by contract. The practice of corporal punishment was still continued to a great extent.... The habit is so inveterate with a great many persons as to render on the least provocation, the impulse to whip a negro almost irresistible.

Id. at 19-20. A black worker might be disciplined for insolence or insubordination "whenever his conduct varie[d] in any manner from what a southern man was accustomed to when slavery existed." *Id.* at 31. Wages were often paltry:

I have heard a good many freedmen complain that, taking all things into consideration, they really did not know what they were working for except food, which in many instances was bad and scanty; and such complaints were frequently well founded.

Id. at 29. Where blacks worked as sharecroppers, their portion of the plantation's crop was at times "so small as to leave them in the end very little or nothing." *Id.* Where the contracts agreed to by the land owners contained fair terms, the employers frequently broke them. *Id.* at 16, 30.

General Schurz found that plantation owners

specifically attempted to use labor contracts as a method to reintroduce slavery:

[M]any ingenious heads set about to solve the problem, how to make free labor compulsory [S]ome South Carolina planters tried to solve this problem by introducing into the contracts provisions leaving only a small share of the crops to the freedmen, subject to all sorts of constructive charges, and then binding them to work off the indebtedness they might incur. It being to a great extent in the power of the employer to keep the laborer in debt to him, the employer might thus obtain a permanent hold upon the person of the laborer.

Id. at 22 (emphasis added). Thus, the former masters were generally willing and even anxious to enter into contracts with their former slaves; it was the freedmen who were wary, "afraid lest in signing a paper they sign away their freedom." *Id.* at 30; see also *id.* at 27.

Although he was apprehensive that legislation would be enacted to facilitate the return of de facto slavery, *id.* at 35, the actual abuses of freedmen which Schurz described were almost exclusively private in

nature. At the time he drafted the report, the only post-war laws of which Schurz was aware that had an adverse effect on blacks were scattered local ordinances in Louisiana and Mississippi, measures which Schurz acknowledged were as of yet "mere isolated cases." *Id.* at 25.

This was the preeminent account of conditions in the South when Senator Trumbull drafted and introduced the Civil Rights Bill. As late as December 13, Trumbull professed uncertainty as to whether the situation in the former slave states required federal legislation. *Cong. Globe*, 39th Cong., 1st Sess. 43. On December 19, when the Schurz report was released, Trumbull admonished the Senate to defer any judgments until the report was read. *Id.* at 80. Seventeen days later, on January 5, 1866, Senator Trumbull, now convinced that congressional action was indeed necessary, introduced S. 61, the bill that was to become the Civil Rights Act of 1866. It is

difficult to believe that Trumbull, acting against the background of the Schurz report, would have intended under S. 61 to permit continuation of the forms of private abuse already then in existence, and to extend federal protection only to certain types of potential, and somewhat hypothetical, statutory problems.

b. The Howard Report. General Howard's account of conditions in the South was contained in his summary of work of the Freedmen's Bureau, which he directed. According to Howard, the greatest actual difficulties encountered by the Bureau were with abusive or dishonest employers. Reports from South Carolina, for example, were "replete with instances of ... cruelty towards the freedmen -- whipping, tying up by the thumbs, defrauding of wages, over-working, combining for purposes of extortion." *H. Exec. Doc. No. 11*, 39th Cong., 1st Sess. 26 (1866). In Louisiana whites were often unwilling "to fulfill their contracts with the

freedmen." *Id.* at 28. The critical problem in Mississippi, as in "many of the other States," was to induce the land owners "to treat [freedmen] kindly, respect their rights, and pay them promptly, as agreed upon in the contract." *Id.* at 30. Howard's circular orders to his subordinates, annexed to his report, reflected a preoccupation with these problems.¹⁷ *Id.*

Howard's report made no mention of any problems created for freedmen by post-war southern legislation, instead noting with approval the action of several states authorizing blacks to testify in their courts. *Id.* at 29 (Louisiana and Alabama). Howard warned that federal protection was required because of private attitudes towards and treatment of freedmen: "[T]here is danger of the [state] statute law being in advance of public

¹⁷ For example, Circular No. 5 directed: "Negroes must be free to choose their own employers, and be paid for their labor. Agreements should be free, bona fide acts, approved by proper officers, and their inviolability enforced on both parties. The old system of overseers, tending to compulsory unpaid labor and acts of cruelty and oppression is prohibited." *Id.* at 45. See also *id.* at 49.

sentiment, so that where there is the most liberality, ill consequences would be likely to result if [federal] government protection should be immediately withdrawn." *Id.* at 32-33.

c. The Grant Report. General Grant, commenting in a letter requested by President Johnson, envisioned a need for a federal role in protecting the freedmen, particularly from abuses by "ignorant men":

It cannot be expected that the opinions held by men at the south for years can be changed in a day, and therefore the freedmen require for a few years ... laws to protect them....

Cong. Globe, 39th Cong., 1st Sess. 78. Grant's only reference to southern legislation was a suggestion that it would ultimately provide whatever protection blacks might require.

2. Hearings of the Joint Committee on Reconstruction.

Trambull's Civil Rights Bill was referred to the

Judiciary Committee on January 5; the Committee reported the bill to the Senate a week later without conducting any hearings on the legislation. Cong. Globe, 39th Cong., 1st Sess. 211. The investigation of actual conditions in the South had been consigned by Congress to a special Joint Committee on Reconstruction. See *id.* at 24-30, 47, 57, 60-62, 69. The hearings of the Joint Committee began on January 22, and continued throughout the congressional consideration of S. 61. The ongoing revelations produced by the Joint Committee hearings supplemented the earlier reports of Generals Schurz, Howard and Grant in providing the factual foundation of congressional reconstruction policy.¹⁸

The Joint Committee hearings painted a detailed

¹⁸ Transcripts of the hearings were available to and mentioned by members of the House during the first debate on the Civil Rights Act. Cong. Globe, 39th Cong., 1st Sess. 1267. During the period between initial passage and the vote to override the President's veto, Congress directed that several thousand copies of the hearings be printed. *Id.* at 1407-1413.

and often grim picture of the serious difficulties then faced by the freedmen, and of the potential significance of pending legislation such as S. 61. Some forms of discrimination forbidden by § 1 of the bill proved to be of little immediate importance; in 776 pages of testimony there are less than half a dozen complaints regarding any inability of freedmen to sue or testify, or the imposition of unequal penalties.¹⁹ The overwhelming majority of the testimony concerning blacks was concerned with three problems -- the inability of blacks to make labor contracts on fair, non-discriminatory terms, the inability of blacks to buy, lease or hold real or personal property, and the failure of local officials to enforce state criminal laws where the victim of an offense was a freedman. All of the testimony regarding labor contract problems, and virtually all the testimony regarding real and personal

¹⁹ Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., pt. iii, p. 8 (excessive penalties), 37 (testimony); pt. iv, p. 50 (right to sue and be sued), 75 (excessive penalties) (1866).

property, concerned abuses by private parties, rather than discriminatory officials or laws.

There were numerous reports of violence being used to prevent former slaves from exercising the right to make employment contracts. In Mississippi an organization known as the "black cavalry" forcibly returned to their old masters freedmen who obtained jobs elsewhere:

[F]reedmen [who] have gone from one county to another and made contracts, ... were brought back by men with their faces blackened, who whipped them and ordered them not to leave again ... even though they were under no contract with their former masters.²⁰

Similar organized patrols, which attacked any blacks found on the roads without written permission from their employers, were reported in Alabama, South Carolina, and Louisiana.²¹ White employers themselves often

²⁰ *Id.* at pt. iii, p. 143; see also *id.* at pt. iii, p. 145.

²¹ *Id.* at pt. ii, p. 222; pt. iii, p. 8; pt. iv, pp. 77, 83.

attacked or killed former slaves if they attempted to quit and seek jobs elsewhere.²²

Freedmen who succeeded in leaving their old masters had little chance of contracting to sell their services on fair, non-discriminatory terms. White land owners, still attached to the slave system in which blacks had worked without compensation, were almost universally unwilling to pay blacks the wages commanded by whites, or the sums for which black slaves, as property, had been rented by their owners prior to the Civil War. Clara Barton and others reported that many former slave owners objected to paying blacks any wages whatever, and were intent upon withholding all compensation once the union army and Freedmen's Bureau were withdrawn from the South.²³ Even under

²² *Id.* at pt. ii, pp. 187, 188; pt. iii, p. 42; pt. iv, pp. 39, 65, 66, 125.

²³ *Id.* at pt. ii, pp. 30, 51, 52, 175; pt. iii, pp. 10, 103 (statement of Clara Barton); pt. iv, pp. 37, 46.

pressure from federal officials, most planters balked at paying blacks more than \$8 a month, and often insisted on paying even less, only a fraction of the rate at which slaves had been hired out prior to the war.²⁴ In the case of sharecropping, although a share of one-third or one-half of the crop was generally regarded as the fair rate, land owners were often willing to offer blacks only one-sixth or one-tenth.²⁵

Most land owners were entirely willing to contract with blacks, providing their onerous terms were accepted; among former slave owners contracts were regarded as a device by which some form of practical slavery could be

²⁴ *Id.* at pt. i, p. 108 (unfair rates); pt. ii, pp. 13 (\$8 a month), 54 (\$3-7 a month), 55 (\$6 a month), 210 (unfair rates), 226, 227 (unjust rates), 234 (\$2 a month); pt. iii, pp. 6 (\$7 a month), 12 (\$2 a month), 41 (\$8-12 a month), 43, 44, 46 (unfair rates), 143 (\$7-10 a month), 150 (\$8-12 a month); pt. iv, p. 116 (\$8 a month). Prior to the Civil War a slave was typically rented out at a rate of \$17 a month. *Id.* at pt. iii, p. 6. After the war the non-discriminatory rate for agricultural workers was approximately \$25 per month. *Id.* at pt. iii, p. 126.

²⁵ *Id.* at pt. ii, pp. 182, 226; pt. iii, pp. 9, 44, 45, 46; pt. iv, pp. 69, 98, 116.

established. Officials of the Freedmen's Bureau explained:

Slavery they have given up in the old form, but they want to subdue and keep in a low place the negroes, by some compulsion which it seems to me they are trying to effect — privately — The idea was that the negro was to be kept subservient to the white race and compelled to labor for low wages. Contracts —, unless regulated by the agents of the Freedmen's Bureau, have been very much on the side of the white man.²⁶

The planters are disposed, in many cases, to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation without a written pass from the proprietor; forbidding them to entertain strangers, or to have fire-arms.... A contract — stipulated that the freedman, in addressing the proprietor, should always call him "master."²⁷

²⁶ *Id.* at pt. ii, p. 243 (emphasis added).

²⁷ *Id.* at pt. ii, p. 243. See also *id.* at pt. ii, pp. 123 ("There is a disposition on the part of citizens to secure, as far as possible, the same control over the freedmen by contracts which they possessed when they held them as slaves."), 126 ("by availing themselves of the ignorance of negroes in the making of contracts, by getting them in debt, and otherwise, they would place them ... in a worse condition than they were in when slaves").

One land owner demanded that his workers "sign a contract to work for him during their lifetime."²⁸ There was also considerable interest among white land owners in replacing slavery with some form of contractual peonage. In Texas and Louisiana planters agreed on a form of contract, or a series of charges, designed to insure that the debts of the freedmen would equal or exceed any wages they were owed.²⁹

The detailed terms and conditions of a freedman's employment frequently were not addressed in any written contract, but were resolved on the job. Here too blacks could not expect fair, non-discriminatory treatment. "The old master was not inclined to treat them differently from what he did when they were slaves.... The old planters were unwilling to come down and make bargains in good

²⁸ *Id.* at pt. ii, p. 228.

²⁹ *Id.* at pt. iii, pp. 80 (system of charges), 124-25 ("blank forms of contracts"); see also *id.* at pt. i, p. 107 (peonage); pt. ii, p. 270 (peonage); pt. iii, p. 7 (peonage); pt. iv, p. 9 (peonage).

faith with those who had been slaves."³⁰ By far the most widespread abuse was the beating or whipping of black workers. One official of the Freedmen's Bureau observed:

Q. Are the people there disposed to resort to personal violence or chastisement to compel the negroes to work now?

A. They are so disposed in nearly every instance. A resort to violence is the first thought that I have seen exhibited when freedmen did not act exactly to suit the employer.... It is the universal ... purpose with them ... to do that.³¹

The hearings of the Joint Committee abounded with stories of black employees who were beaten by their masters for the least transgression, or for no apparent reason whatever; such treatment was never visited upon white employees.³²

³⁰ *Id.* at pt. iv, p. 116.

³¹ *Id.* at pt. iv, p. 83.

³² *Id.* at pt. ii, pp. 17 (white "disposition ... to maltreat the negro"), 55 (whipping), 61 (whipping), 83 ("cruelty," "scourging" and "torturing"), 170 (beating and whipping), 188 (whipping and beating), 226 (beating) (continued...)

Equally abundant was testimony about employers who, having received the services agreed upon by their black workers, disregarded their contractual obligations to pay them in return. After the crops of 1865 were harvested in the fall of that year, many thousands of black workers, a majority of all the freedmen in some areas, were driven from the plantations without being paid.³² In other instances white planters simply refused to pay their black employees, provided them with a smaller proportion of the crops than had been agreed upon, attempted to deduct from their wages unjustified charges, or sought to

³² (...continued)

228 (beating); pt. iii, pp. 42 (beating), 43 (violence), 146 (beating); pt. iv, pp. 46-47 (beating), 47 (shooting), 65 (beating).

³³ *Id.* at pt. ii, pp. 52, 188, 222, 223, 225, 226, 228; pt. iii, pp. 142, 173-74; pt. iv, pp. 64, 66, 68.

defraud them in other ways.³⁴ The Freedmen's Bureau was forced to intervene on behalf of blacks in thousands of such cases, and federal officials estimated that a majority of the wages actually paid would have been withheld but for the Bureau's action.³⁵

Except in the case of Mississippi, there were no complaints regarding legal obstacles to the purchase or leasing of real property by blacks. But the legal right to buy or rent such property was meaningless, because white land owners were generally unwilling to sell or lease real

³⁴ *Id.* at pt. ii, pp. 188, 194, 195, 225, 228, 229, 272; pt. iii, pp. 42, 43, 151 ("[t]here seemed to be a disposition on the part of a very large number of the planters to overreach ... the freedmen, and to defraud them of a part of their earnings"); pt. iv, pp. 8, 10, 37, 38 (freedmen "have universally been treated with bad faith and very few have received any compensation for work performed up to the close of the year 1865").

³⁵ *Id.* at pt. ii, pp. 19, 195; pt. vi, pp. 8, 37 ("Not one in ten [freedmen] would have received any compensation for labor performed during the year 1865, had it not been for the vigorous measures of union army officials"); 38 ("seven out of every ten who have paid wages to the freed people ... have done so over the point of the bayonet"), 45, 80 ("The negroes ... without the aid of the government, would not be able to secure their wages...").

property to freedmen.³⁶ A series of witnesses observed that, because of the resistance of white land owners, "it is with great difficulty that a negro can rent land to tend himself.... If the negroes will work for them they will hire them, but they are not willing to rent them lands."³⁷ In particular, "[f]ormer slave owners will not lease or sell land to negroes."³⁸ "Most of them leave their plantations lying idle rather than to sell or rent any of their lands to negroes."³⁹ One witness testified, "A rebel colonel told me that he would rather his property were sunk in the middle of perdition than to lease it to negroes, much less to sell it to them; and many others expressed similar

³⁶ *Id.* at pt. ii, pp. 149, 154, 182, 235-36, 243; pt. iii, pp. 4, 6, 25, 27, 30, 36, 45, 62, 66, 71, 101, 12, 151; pt. iv, pp. 10, 56, 62, 69, 117.

³⁷ *Id.* at pt. ii, p. 154.

³⁸ *Id.* at pt. iii, p. 154.

³⁹ *Id.* at pt. iv, p. 10.

sentiments.⁴⁰ When blacks succeeded in leasing land, it was often through subterfuge, such as by enlisting a white man to act as the nominal lessee.⁴¹ Planters opposed leasing lands to blacks because it interfered with their ability to dictate the terms under which freedmen would be hired; "They say that unless negroes work for them they shall not work at all."⁴²

In most states there were no complaints about any problems that had been caused by post-war legislation in the South. While there was fear that some future official action might aggravate the position of blacks,⁴³ there was a widespread agreement that existing private

⁴⁰ *Id.* at pt. iv, p. 69; *see also id.* at pt. iii, p. 66 ("combination of landowners, agreed not to rent to blacks").

⁴¹ *Id.* at pt. iii, pp. 4-45.

⁴² *Id.* at pt. iv, p. 62; *see also id.* at pt. ii, p. 101 ("farm owners ... desire to keep negroes landless, and as nearly in a condition of slavery as it is possible for them to do"); pt. iv, p. 117 (land holders oppose selling land to blacks "because it was putting them in a position of independence...").

⁴³ *Id.* at pt. iii, pp. 18, 25, 70, 143, 183; pt. iv, p. 33.

discrimination and abuses had already rendered the situation of freedmen intolerable. There was some concern that in the future, state action might be used to support a system of de facto slavery but the record before the Joint Committee demonstrated that this insidious goal had in many areas already been achieved in part, and in some regions been accomplished in full, as a result of existing private discrimination and abuse.

B. The 1866 Congressional Debates Establish that Congress Intended § 1 of the 1866 Act to Reach Purely Private Conduct.

In light of the circumstances that existed in the South in early 1866, as reported to Congress by Schurz, the Joint Committee, and others, the question of Congressional intent raised in Runyon and Jones is an essentially pragmatic one -- did Congress intend the existing systematic oppression and even practical re-enslavement of freedmen to continue so long as the former slave owners achieved their ends solely through private acts? It would be surprising indeed if Congress,

fully aware that those goals were being pursued with considerable efficacy by means of both private conduct and governmental discrimination, chose not to forbid the success of such schemes, but only to channel the desire for restoration of slavery into private techniques alone. The debates of the thirty-ninth Congress make clear that the supporters of the Civil Rights Act were determined to end the oppression of blacks, not merely to refine the methods of their oppression.

1. Congress Included Private Actions Among the Problems It Intended to Address.

References to the problem and varieties of private discrimination against freedmen are found in virtually every debate of the thirty-ninth Congress regarding the condition of freedmen. The very first speech on the condition of former slaves, by Senator Wilson on December 13, 1865, asserted that blacks were the victims of killings, atrocities, and outrages. Wilson quoted a

letter describing the situation of blacks in Mississippi prior to the adoption of any of the black codes as "worse off in most respects than they were as slaves." Cong. Globe, 39th Cong., 1st Sess. 39-40.⁴⁴ Senator Johnson, who would later be among the chief opponents of the Civil Rights Act, promptly disputed these charges, denying the claim that the men of the South were "semi-barbarous," and challenging Wilson's "supposed means of information." *Id.* at 40. Senator Trumbull, although uncertain whether Wilson's charges were accurate, admonished that strong legislation would be needed "if what we have been told today in regard to the treatment of freedmen in the South is true." *Id.* at 43.

Wilson's allegations were reiterated in the days immediately preceding the introduction of S. 61 on January 5, 1866. Senator Sumner reported that planters

⁴⁴ The letter is dated November 13, 1865, *id.* at 95; the Mississippi laws respecting freedmen were not adopted until November 25.

in South Carolina had agreed in public meetings not to rent land to blacks or "to contract with any freedman unless he can produce a certificate of regular discharge from his former owner." *Id.* at 93. In Tennessee "in very many cases" "rascally employers" refused to pay wages earned by their black workers. *Id.* at 95. Wilson defended his original charges, challenging his colleagues to examine the records and reports at the office of the Freedmen's Bureau documenting these "great atrocities and cruelties." *Id.* at 111. One of those who did so was Senator Trumbull.⁴⁵ A petition to the Senate from blacks in Alabama complained that "many of their people are now in a condition of practical slavery, being compelled to serve their fellow owners without pay and to call them 'master.'" *Id.* at 127.⁴⁶

⁴⁵ E. Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 243 (1988).

⁴⁶ The Alabama laws regarding labor contracts and apprentices were not enacted until late February, 1866.

References to such private outrages continued throughout the debates on the Civil Rights Act. Representative Wilson's opening speech in support of the bill admonished:

the hate of the controlling class in the insurgent States toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our enemies to our colored friends. We should put a stop to this at once and forever.

Id. at 1118 (emphasis added). Other speakers referred specifically to the killing, whipping and robbing of blacks, attacks on black schools, conspiracies by white planters not to hire freedmen, and gangs of whites enforcing a de facto pass system.⁴⁷ Representative Lawrence observed that

[T]here is a present necessity for this bill.... [I]t would take an army of twenty thousand men to compel the planters to do justice to the freedmen. This bill takes right hold of this matter.

⁴⁷ *Id.* at 1159-60 (Rep. Windom), 1759 (Sen. Trumbull), 1833-35 (Rep. Lawrence), 1828-39 (Rep. Clark), App. 181 (Sen. Wade).

Id. at 1833 (emphasis added). Lawrence quoted the testimony of Major General Alfred H. Terry that:

Many persons are treating the freedmen ... with great harshness and injustice, and seek to obtain their service without just compensation, and to reduce them to a condition which will give to the former masters all the benefits of slavery....

Id. Speakers in favor of the bill cited the reports of Generals Schurz and Grant, as well as testimony before the Joint Committee.⁴⁸ Senator Wade observed on the day of the critical vote to override the President's veto, that the "flood of testimony brought from this great committee has enlightened everybody upon the facts." *Id.* at 180.

There was widespread agreement with the view earlier expressed by General Schurz that the old slave owners were determined to hold freedmen in a state of

⁴⁸ *Id.* at 1267 (remarks of Rep. Raymond), 1407-13, 1827 (remarks of Rep. Baldwin), 1833-34 (remarks of Rep. Lawrence), 1839 (remarks of Rep. Clark).

practical slavery.⁴⁹ Proponents of the Civil Rights Act were under no illusion that the former masters would restrict themselves to seeking to achieve that end by enacting onerous legislation, but knew that "the old slaveholders ... would resort to every means in their power." *Id.* at 503 (Sen. Howard). Thus, the purpose of the Civil Rights Act was not simply to bar the former slave holders from utilizing the machinery of state government to achieve that end, but to thwart altogether attempts to re-enslave and oppress the freedmen. For Senator Trumbull the critical issue was whether "this bill [will] be effective to" "end and prevent slavery," and he insisted that if the measure was adopted "we shall have secured freedom in fact." *Id.* at 474-76. See also *id.* at 1118 (Rep. Wilson), 1151-53 (Rep. Thayer), 1159 (Rep. Windom), 1759 (Sen. Trumbull), 1761 (Sen. Trumbull),

⁴⁹ *Id.* at 504 (Sen. Howard), 1118 (Rep. Wilson), 1125 (Rep. Cook), 1833-35 (Rep. Lawrence), 1838 (Rep. Clarke).

1828 (Rep. Baldwin). This fierce determination to end completely and for all time the subjugation of freedmen reflected the fearful cost incurred by the nation in lives and destruction in order to bring an end to chattel slavery. Senator Trumbull admonished those of his colleagues who insisted that Congress lacked the power to protect the freedmen from practical slavery:

Go tell it, sir, to the father whose son was starved at Andersonville, or the widow whose husband was slain at Mission Ridge, or the little boy who leads his sightless father through the streets of your city, ... or the thousand other mangled heroes to be seen on every side.⁵⁰

These are not the words of a person who believed that the whites of the rebel states were to remain free to work their will on the freedmen so long as they were careful to do so without resort to the machinery of government.

⁵⁰ *Id.* at 1757; see also *id.* at 341 (Sen. Wilson), 344 (Sen. Wilson), 504 (Sen. Howard), 1124 (Rep. Cook), 153 (Rep. Thayer), 1839 (Rep. Clarke).

Opponents of the civil rights bill focused their objections on two aspects of the bill -- nullification of state statutes and the imposition of criminal penalties on state officials who carried out those laws. As a consequence, proponents of the Civil Rights Act concentrated their own arguments on the need to deal with state discrimination. But both sides recognized that the Civil Rights Act was not limited to such discriminatory governmental measures. Senator Trumbull announced prior to introducing S. 61 that it was intended to deal with the danger that "by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed."⁵¹ Representative Thayer condemned "the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the

⁵¹ *Id.* at 77 (emphasis added). See also *id.* (duty of Congress to protect freedmen against "any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty").

object of this bill forever to remove." *Id.* at 1152. Representative Kerr opposed the bill because it would apply to a church which refused to rent its most desirable pews to blacks. *Id.* at 1268. Senator Davis objected that the Act would apply not only to churches, but also to railroads, street cars, boats, hotels, restaurants, saloons and baths which practiced racial segregation. *Id.* at App. 183. During the critical days preceding the vote to override President Johnson's veto, the argument that the bill would affect such public accommodations was widely repeated in newspapers and journals supporting the veto.⁵²

Davis also complained that the bill would interfere with relations between black workers and white employers, relations that he insisted would be handled in a fair manner by the parties themselves if only there were

⁵² We set out in Appendix A the texts of some of these published objections.

no federal intervention:

The passage of such a bill is calculated to produce interference between, and a disturbance of, the relations of the black laborer and his white employer, to get up feuds and quarrels.... The way to avoid that feud ... is to leave the relationship to itself and the parties to it....

Id. at 1416. This objection would have made no sense if Davis had thought the act was inapplicable to private employment relationships. President Johnson expanded on this argument in his veto message, objecting that the bill attempted to regulate by law employment questions which could be fairly resolved through ordinary economic forces. Black workers and white employers, the President urged, had

equal power in settling the terms, and if left to the laws that regulate capital and labor, ... [would] satisfactorily work out the problem.... This bill frustrates this adjustment. It intervenes between capital and labor, and attempts to settle questions of political economy through the agency of numerous officials.

Although proponents of the Civil Rights Act were quick to disavow what they thought were deliberately inaccurate interpretations of the bill,⁵³ and although Senator Trumbull responded to virtually every paragraph in Johnson's veto message, no member of the House or Senate rose to dispute these descriptions of the law by Kerr, Davis, and the President.

2. Congress Understood § 1 of 1866 Civil Rights Act to Have The Same Scope as § 7 of the Vetoed Freedmen's Bureau Bill.

Section 7 of the Freedmen's Bureau Bill, introduced by Senator Trumbull as a companion to the Civil Rights Bill, extended "military protection and jurisdiction" over all cases in which persons in the former rebel States were "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, [denied or refused] any of the civil rights or immunities belonging to white persons, including the right

⁵³ Cong. Globe, 39th Cong., 1st Sess., at 1837 (Rep. Lawrence).

to make and enforce contracts ... on account of race.⁵⁴ Justice Harlan acknowledged in his dissent in *Jones* that § 7 would have applied to private discrimination, but insisted that the different wording of § 1 of the Civil Rights Act reflected a different intent on the part of Congress:

In the corresponding section of the ... civil rights bill ... the reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

392 U.S. at 457.

Justice Harlan's argument would have had considerable force if § 1 limited its application to denials "in consequence of any State or local law, ordinance, police or other regulation or custom," but deleted the

word "prejudice." But what is "omitted" from § 1 is not simply the word "prejudice," but the entire phrase, beginning with the word "in consequence," in which prejudice as well as laws and customs are mentioned. A closer comparison of §§ 7 and 1 suggests a conclusion opposite to that reached by Justice Harlan. The right protected by § 7 is "the ... righ[t] of white persons ... to make and enforce contracts," language substantially identical to the right-defining terminology of § 1. The phrase in § 7 referring to denials of rights "in consequence of ... law or prejudice" describes the circumstances under which military jurisdiction will be exercised, not the substance of the right to be enforced by the Freedmen's Bureau officials. The fact that Congress foresaw that the right referred to in § 7 -- and § 1 -- might be denied by reason of private "prejudice" strongly suggests that Congress understood § 7 to protect against private as well as government imposed discrimination, for

⁵⁴ The text of the bill is set forth in E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 72 (1871) (emphasis added).

only a right to be free from private discrimination was likely to be denied "in consequence of" private prejudices.

The congressional debates make clear that Congress understood § 1 of the Civil Rights Act to have the same scope as § 7 of the vetoed Freedmen's Bureau Bill. Representative Bingham insisted that § 7 enumerated "the same rights and all the rights and privileges that are enumerated in the first section of the Civil Rights Bill." Cong. Globe, 39th Cong., 1st Sess. 1291 (emphasis added). Senator Davis, who opposed both measures, repeatedly referred to the Freedmen's Bureau Bill and the Civil Rights Bill as "twins."⁵⁵

3. The Dissenting Opinion in Jones Is Not Persuasive.

The dissenting opinion in *Jones* makes two primary arguments in support of the conclusion that Congress intended § 1 of the 1866 Act to reach only state action.

⁵⁵ *Id.* at 523, 575, 595; see also *id.* at 1121 (Rep. Rogers; civil rights bill a "relic" of Freedmen's Bureau bill).

First, Justice Harlan interprets a number of statements made during the debates as reflecting an intent on the part of Congress to reach only "state-sanctioned discrimination." 392 U.S. at 453. Second, Justice Harlan notes the existence of only a few statements either supporting or opposing coverage of private discrimination, and argues that, had Congress intended such coverage, the supporters would have defended this aspect of the bill more vigorously, 392 U.S. at 461, and the opponents would have protested this coverage more "strenuously," *id.* at 463. As discussed below, the remarks relied upon by Justice Harlan, when read in the context in which they were made, do not support the interpretation advanced in the dissent. And the relative lack of attention to the coverage of private racial discrimination is understandable when viewed in the historical context.

(i) There are a number of statements in the debates which stress the need to prevent discriminatory

state action. Read in the context in which they occurred, however, the passages in question emphasize only the importance of ending such invidious official conduct, and do not evidence an intent to tolerate similar conduct taken with a similar purpose by whites holding no public office. From the very outset of the debates on the Civil Rights Bill, opponents focused their arguments on two principal objections -- that § 1 would have the effect of nullifying discriminatory state statutes,⁵⁶ and that § 2 would impose criminal penalties on state officials, particularly judges, who implemented such state laws.⁵⁷ Opponents argued that any statutory invalidation of state laws violated the tenth amendment, *id.* at 595 (Sen.

⁵⁶ *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 478 (Sen. Saulsbury), 499 (Sen. Cowan), 601 (Sen. Guthrie), 606 (Sen. Saulsbury), 1121 (Rep. Rogers), 1270 (Rep. Kerr), 1415 (Sen. Davis), 1680 (veto message), 1777 (Sen. Johnson), 1782 (Sen. Cowan), App. 182-84 (Sen. Davis).

⁵⁷ *E.g.*, *id.* at 597, 599 (Sen. Davis), 602 (Sen. Hendricks), (Rep. Rogers), 1154-55 (Rep. Eldridge), 1265 (Rep. Davis) 1271 (Rep. Kerr), 1291 (Rep. Bingham) 1296 (Rep. Latham), 1680 (veto message), 1780-83 (Sen. Cowan), 1809 (Sen. Saulsbury).

Davis), 1977 (Sen. Johnson), App. 184 (Sen. Davis), and some, including Representative Bingham, insisted that Congress could never impose the criminal penalties on state officials, *see, e.g., id.* at 1291. In the face of these attacks, proponents of the Civil Rights Bill understandably devoted most of their own remarks to justifying the application of § 1 to discriminatory state statutes, and the application of § 2 to discriminatory state officials.

A number of the passages cited by Justice Harlan merely emphasize the importance of dealing with governmental discrimination. Of such limited significance are passages such as these:

Sir, if it is competent for the new-formed Legislature of the rebel States to enact laws . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery?⁵⁸

⁵⁸ 392 U.S. at 466 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1151 (Rep. Thayer)).

[W]hat kind of a freedom is that by which the man placed in a state of freedom is subject to the tyranny of laws which deprive him of [natural] rights . . . ?⁵⁹

What is the necessity which gives rise for that protection? See, in at least six of the lately rebellious States the reconstructed Legislatures of those States have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of freed men....⁶⁰

Statements of this sort fall far short of indicating that state action was Congress' sole concern.

In a number of instances, passages quoted by Justice Harlan are taken out of a context which give them a meaning quite different than that suggested by the dissent. For example, Justice Harlan excerpted from this statement by Representative Wilson only the first sentence:

It will be observed that the entire structure

⁵⁹ 392 U.S. at 466, (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1152 (Rep. Thayer)).

⁶⁰ 392 U.S. at 467 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1153).

of this bill rests on the discrimination relative to civil rights and immunities made by the states on "account of race, color, or previous condition of slavery." That these things should not be is no answer to the fact of their existence. That the result of the recent war, and the enactment of the measures to which the events of the war naturally led us, have intensified the hate of the controlling class in the insurgent states toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever.⁶¹

Read in full this passage makes clear that Wilson intended the bill to deal not only with discriminatory laws, but also "treatment inhuman . . . by our white enemies."

Justice Harlan quotes Representative Thayer as asking:

[W]hat kind of freedom is that by which the man placed in a state of freedom is subject to the tyranny of law which deprive him of [natural] rights?⁶²

⁶¹ Cong. Globe, 39th Cong., 1st Sess. 1118 (emphasis added). The passage in the dissenting opinion is at 392 U.S. at 465.

⁶² *Id.* at 1152, cited at 392 U.S. at 466.

By italicizing the word "law," the dissent suggests that Thayer was concerned only about tyrannical statutes. But only seven sentences before this passage Representative Thayer more broadly condemned:

the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of this bill forever to remove.⁴³

Many of the tyrannical acts and restrictions appurtenant to slavery were taken and imposed by slave owners, rather than by any state government. The most plausible interpretation of Thayer's remarks is that he intended the bill to apply to these private abuses as well.

Justice Harlan cites the following statement by Senator Trumbull as a "wholly unambiguous statement[] which indicated that the bill was aimed only at 'state action':

If an offense is committed against a colored person simply because he is colored, in a state where the law affords him the same protection as if he were

⁴³ 14.

white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in state court.

A review of the page of the Congressional Globe where this sentence appears, however, makes it clear that Trumbull was discussing, not the bill as a whole, but the penal provisions of the bill, which are contained in § 2 and which were expressly limited to state action and to customs. The sentence immediately before the portion of the speech quoted by Justice Harlan sets forth the reason why the punitive provisions would be inapplicable in the hypothesized case. The explanation is not that the bill as a whole does not reach private conduct, but that in § 2 "[t]hese words 'under color of law' were inserted as words of limitation."⁴⁴ Such "words of limitation" would have been entirely unnecessary if § 1 itself had been limited to actions under color of law and custom.

⁴⁴ 302 U.S. at 460 (citing Cong. Globe, 39th Cong., 1st Sess. 1758).

⁴⁵ Cong. Globe 39th Cong., 1st Sess. 1758.

Another "wholly unambiguous" statement cited by Justice Harlan is excerpted from the following statement by Senator Trumbull. The portion actually reproduced in the dissenting opinion is underscored:

The President in his annual message . . . was . . . decided in the assertion of the right of every man to life, liberty, and the pursuit of happiness. This was his language . . . "good faith requires the security of the free men in their liberty and their property." . . . Acting from the considerations I have stated, and believing that the passage of a law by Congress, securing equality in civil rights when denied by State authorities to freed men and all other inhabitants of the United States, would do much to relieve anxiety in the North, to induce the southern states to secure these rights by their own action, and thereby remove many of the obstacles to an early reconstruction, I prepared the bill substantially as it is . . .⁶⁶

Justice Harlan italicized the words "when denied by State authorities." The omission of the reference to the other "considerations" obscured the fact that Trumbull actually gave not one but two reasons for proposing the act. That

⁶⁶ 2 Cong. Globe, 39th Cong., 1st Sess. 1760. The partial quotation by Justice Harlan is at 392 U.S. at 461.

other consideration, the protection of the lives, property and liberty of freedmen, almost certainly referred to private action, since attacks on the lives and property of blacks were virtually all committed by private citizens.

Other passages cited by Justice Harlan would, if construed in the manner he suggests, simply prove too much. The dissent cites, for example, the following remark by Representative Bingham:

[W]hat, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every state constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen.⁶⁷

If by "simply" Bingham meant "solely," this passage would indeed indicate that private acts of discrimination were not covered. But Bingham cannot have meant "solely," because that would limit § 1 to state constitutions, and render it inapplicable, for example, to state statutes or

⁶⁷ 392 U.S. at 467 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1291).

actions by state officials. Similarly, Senator Trumbull is quoted as asserting:

[This bill] will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.⁶⁸

This too would support Justice Harlan's view of the 1866 act, if Trumbull were asserting that Kentucky could remove itself from the operation of the act by repealing all discriminatory statutes. But that cannot have been Trumbull's meaning, since Justice Harlan concedes that the act clearly covers discriminatory administration of neutral laws, state enforcement of private agreements to discriminate,⁶⁹ and even acts of private persons if done pursuant to "custom," 392 U.S. at 457.

The dissent notes other similarly intriguing remarks by Senator Trumbull:

⁶⁸ 392 U.S. at 459 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 476).

⁶⁹ *Hardy's Hedge*, 334 U.S. 24 (1948).

Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens, this bill has no operation whatever in the State of Kentucky.⁷⁰

This bill ... could have no operation in Massachusetts, New York, Illinois, or most of the states of the Union.⁷¹

But these remarks cannot literally mean the Civil Rights Act would have no operation in these states because, even if a state and all its subdivisions did not engage in discrimination, the act would still apply, as Justice Harlan acknowledged, to "those discriminations which were legitimated by a ... community sanction sufficiently powerful to deserve the name 'custom'." 392 U.S. at 457. In each of these cases the context in which the remark was uttered makes clear that Bingham and Trumbull meant only that, in the absence of specified forms of

⁷⁰ 392 U.S. at 459, (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 476).

⁷¹ 392 U.S. at 460 (emphasis by Justice Harlan) (citing Cong. Globe, 39th Cong., 1st Sess. 1761).

discrimination, the act would not apply to the type of state action referred to.⁷²

Justice Harlan cites a statement by Senator Trumbull that § 2 of the Thirteenth Amendment was adopted:

*for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free.*⁷³

Since Trumbull "indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights" immediately after making this statement, Justice Harlan inferred that the stated purpose of § 2 of the Thirteenth Amendment "also [was] the aim of the promised bills." 392 U.S. at 455-56. However, this

⁷² The last of the Trumbull quotation, for example, is preceded by the following sentence: "This will in no manner interfere with the municipal regulations of any State which protects all alike in their rights of person and property." *Id.* at 1761.

⁷³ 392 U.S. at 455 (citing Cong. Globe, 39th Cong., 1st Sess. 43).

reasoning supports the conclusion that Trumbull intended the Civil Rights Bill to cover private racial discrimination, since there is no doubt that the Freedmen's Bureau Bill reached such conduct. Certainly, the fact that the Freedmen's Bureau Bill extended to private conduct demonstrates that Trumbull did not use "and none other" to mean "only." Indeed, Trumbull cannot have meant that § 2 of the Thirteenth Amendment reaches only actions by State legislatures. Both §§ 1 and 2 obviously extend as well to enslavement at the hands of any other branch of state government or by state subdivisions, and even the most conservative members of the thirty-ninth Congress agreed that § 2 authorized federal legislation to protect freedmen from private individuals who sought to restrain and enslave them by force. Read in the context of the debate in which they were spoken, as Justice Stewart noted in *Jones*, the words "and none other" were meant to emphasize that § 2 was adopted "precisely," not

exclusively, to authorize congressional action to nullify oppressive state laws. 392 U.S. at 430 n.48.

Finally, Justice Harlan cites a statement by Trumbull in which, after objecting to several recently adopted state laws, the Senator commented:

[t]he purpose of the bill under consideration is to destroy all these discriminations, and carry into effect the constitutional amendment.⁷⁴

The portion of this passage beginning with "and" makes clear that the Bill had a second broader purpose, to assure implementation of the Thirteenth Amendment.

(ii) Justice Harlan also relies upon Congress' relative silence with respect to coverage of private discrimination. In the course of a speech justifying § 3 of the Civil Rights Bill, which conferred jurisdiction on the federal courts to redress violations of § 1, Senator Trumbull asserted that § 2 of the Thirteenth Amendment

⁷⁴ 392 U.S. at 458 (emphasis by Justice Harlan)(citing Cong. Globe, 39th Cong., 1st Sess. 474).

provided authority to establish such jurisdiction where needed to protect freedmen from discriminatory laws or customs. Cong. Rec., 39th Cong., 1st Sess. 1759. Justice Harlan argued:

If the bill had been intended to reach purely private discrimination it seems strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever.

392 U.S. at 461. Similarly, Justice Harlan concluded that if the bill's opponents thought that the bill reached wholly private conduct, "it seems a little surprising that they did not object more strenuously." 392 U.S. at 463.

The focus of Senator Trumbull's remark, however, is entirely understandable when one notes that his entire speech was intended as a response to President Johnson's veto message. The aspect of § 3 to which the President objected was the existence of what he believed would be exclusive federal jurisdiction over cases in which states denied the rights secured by § 1. Cong. Rec., 39th Cong.,

1st Sess. at 1680-81.

More importantly, Justice Harlan's argument reflects an historical anachronism. Writing in 1968, after the adoption of the Fourteenth Amendment and the decision in the Civil Rights Cases, 109 U.S. 3 (1883), limiting the reach of that amendment to state action, Justice Harlan understandably regarded federal prohibitions against private discrimination as more unusual, and constitutionally more "dubious," than a federal law against state discrimination. But in early 1866 these developments lay in the future. At that point in American constitutional history, the imposition of federal obligations on state officials was the more dubious proposition. Prigg v. Pennsylvania, 16 Pet. 539 (1842), and Kentucky v. Dennison, 24 How. 66 (1861), then held that Congress generally could not impose such duties on

states or their officials.⁷⁵ Justice Harlan suggested that the intent of the framers of the 1866 Act be construed in light of the 1883 decision in the Civil Rights Cases, 392 U.S. at 458 n.19, but the case actually cited during the 1866 debates was the 1842 decision in Prigg.⁷⁶ Thus, in the constitutional context in which the 1866 Act was debated, it was the imposition of federal restrictions on states and state officials, not on individuals, that was particularly likely to encounter fierce opposition.

III.

CONGRESS HAS ADOPTED THE PRINCIPLE THAT § 1981 PROHIBITS PRIVATE RACIAL DISCRIMINATION

The Court has requested additional briefing and argument on whether it should reconsider the ruling in Runyon v. McCrary, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 prohibits private contractual discrimination on the

⁷⁵ See Monell v. New York City Dept. of Soc. Services, 436 U.S. 658, 676-78 (1978).

⁷⁶ Cong. Globe, 39th Cong., 1st Sess. 1270 (Rep. Kerr), 1294 (Rep. Wilson), 1836 (Rep. Lawrence). Cf. *id.* at 1154 (Rep. Eldridge).

basis of race. The Runyon decision is part of a line of cases concerning the scope and meaning of 42 U.S.C. §§ 1981 and 1982 that began in 1968 with Jones v. Mayer Co., 392 U.S. 409, and is capped by three unanimous decisions in 1987.⁷⁷

The decisions in Jones, Johnson, Runyon, McDonald and other § 1981 and § 1982 cases do not stand alone as an independent body of law that can be internally revised with no external consequences. Rather, the chronology of developments over the past twenty-four years shows that the Court's decisions interpreting §§ 1981 and 1982 have been woven into the larger body of laws protecting civil rights that has been developed

⁷⁷ Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S. Ct. 2617 (unanimous agreement that private racial discrimination prohibited by § 1981); St. Francis College v. Al-Khazraji, 481 U.S. ___, 107 S. Ct. 2022 (1987); Shaw v. Telford Congregation v. Cobb, 481 U.S. ___, 107 S. Ct. 2019 (1987). The other cases are: Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Memphis v. Greene, 451 U.S. 100 (1981); General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

through the interaction of the courts, Congress and the executive branch.

As we set out below, Congress has consistently expressed its intent to leave § 1981 standing as an independent remedy for employment discrimination, has demonstrated its awareness of decisions of this Court and the lower courts that have held that the section prohibits discrimination by private employers, and has specifically broadened the remedies available in § 1981 actions against private defendants to include attorneys' fees. These actions establish Congress' agreement with, acquiescence in, and ratification and adoption of, the holdings in Runyon, Johnson and McDonald, among others.

This case does not, of course, present an instance where Congress has reenacted a statute in light of court decisions interpreting it, since there was no need to reenact § 1981. There is, however, no meaningful

distinction between Congress' actions concerning § 1981, and the amendment or reenactment of statutes involved in numerous cases in which the Court has concluded that Congress adopted Court precedents.⁷⁹

Indeed, it is difficult to conceive of a clearer example of Congress' adoption of judicial interpretations of existing statutes -- an adoption that goes beyond mere acquiescence or even ratification. The chronology below shows that Congress was not only aware of, but expressed specific approval of, the Court's decisions in *Jones*.

⁷⁹ E.g. *Lindahl v. OPM*, 470 U.S. 768 (1985) (amendment of statute without explicitly repealing Supreme Court decision creates presumption that Congress intended to embody the doctrine in amended statute); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) (where statute amended in reliance upon Supreme Court interpretation, the Court is no longer free to change its interpretation); *Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. South Buffalo Railway Co.*, 333 U.S. 771 (1948) (rejection of proposed amendment to nullify judicial interpretation demonstrated a deliberate decision not to modify the Act; therefore, Court could not change its interpretation); *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1948). See also *Monessen Southwestern Railway Co. v. Morgan*, 56 U.S.L.W. 4474, 4476 (U.S. June 6, 1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation].").

Johnson and *McDonald*, as well as numerous lower court decisions applying them. Congress not only rejected amendments that would have nullified those decisions, but built upon them when it specifically provided for awards of attorneys' fees in actions brought under §§ 1981 and 1982 against private parties. These actions go far beyond what the Court found to constitute acquiescence by Congress in the revenue ruling at issue in *Bob Jones University v. United States*, 461 U.S. 574, 599-600 (1983). Given the events in Congress, the principle that §§ 1981 and 1982 prohibit private racial discrimination has attained the force of an explicit legislative enactment.

Civil Rights Act of 1964

In enacting the first major piece of modern civil rights legislation, Congress left no doubt that the Civil Rights Act of 1964 was intended to supplement, not to supplant or cut back on, existing remedies.⁷⁹ Senator Tower offered an amendment that would have made Title VII the exclusive remedy for employment discrimination. 110 Cong. Rec. 13650-13652. Senator Ervin, arguing in favor of the amendment, read the text of § 1981 into the record. Since Title VII as enacted in 1964 covered only private employers, it seems clear that members of the Senate, including Senator Ervin, believed that § 1981 already prohibited such private discrimination. The Senate rejected the Tower amendment, making clear its intent to retain other statutory remedies.

⁷⁹ An explicit disclaimer of any adverse effect on the availability of other remedies was included in several Titles of the 1964 Act. See 42 U.S.C. Section 2000a-6(b) (Title II—Public Accommodations), Section 2000b-2 (Title III—Desegregation of Public Facilities), Section 2000e-8 (Title IV—Discrimination in Public Education).

The Jones Decision

In 1968, the Court ruled in Jones v. Mayer that § 1 of the Civil Rights Act of 1866 “was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein -- including the right to purchase or lease property.” 392 U.S. at 436. The Court had the benefit of detailed analyses of the legislative history provided by the parties, the United States and several other capable amici. Justice Stewart’s opinion, joined by six other Justices, thoroughly canvassed the history and precedents and responded to detailed arguments made in the dissenting opinion.⁸⁰ Although primarily addressed to § 1982, the opinion in Jones made clear that the Court’s reasoning also applied to § 1981.⁸¹

⁸⁰ 392 U.S. at 449 (Harlan, J., joined by White, J., dissenting).

⁸¹ 392 U.S. at 435-436 (interpreting § 1 of 1866 Act), 422 n.28 (§ 1981 derives from § 1 of 1866 Act), 442 n.78.

The Fair Housing Act of 1968

The oral argument in *Jones* was presented on April 1 and 2, 1968. On April 10, 1968, Congress passed the Fair Housing Act.⁸² Congress was fully aware of the pendency of the *Jones* case, and of the possibility that § 1982 would be construed to cover private conduct.⁸³ Congress was also aware that the procedures and remedies under § 1982 would be different from those under the Fair Housing Act.⁸⁴ With this background, Congress explicitly provided that the Fair Housing Act does not "invalidate or limit any law ... that grants, guarantees, or protects the rights ... granted by this title

⁸² Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, codified at 42 U.S.C. § 3601 et seq. (1982).

⁸³ During the floor debate on the Fair Housing Act, Representative Kelly recited the text of § 1982, described the *Jones* case and explained that the Attorney General had informed the Court that "the scope [of § 1982] was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary." 114 Cong. Rec. 9601-9602 (1968).

⁸⁴ See note 82, *supra*.

— 42 U.S.C. § 3615 (1982).

Court Decisions: 1968-1972

In 1969, the Court ruled in *Sullivan v. Little Hunting Park*, 396 U.S. 229, that § 1982 prohibits a private recreation association from withholding, on the basis of race, approval of an assignment of membership that was transferred incident to a lease of real property.⁸⁵ The Court concluded that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection intended to be afforded by § 1 of the Civil Rights Act of 1866." 396 U.S. at 237.

The impact of the *Jones* and *Sullivan* decisions on § 1981 and its scope was not lost on the lower federal courts. These courts immediately began to apply § 1981

⁸⁵ Three members of the Court dissented, 396 U.S. at 241 (Harlan, J., joined by Burger, C.J., and White, J.).

to private discrimination related to contracts.⁸⁶ The federal courts fully embraced the implications of the *Jones* decision and without hesitation applied both §§ 1981 and 1982 to various forms of private discrimination.

Equal Employment Opportunity
Act of 1972

In 1972, Congress amended Title VII of the Civil Rights Act of 1964.⁸⁷ The 1972 legislative history shows that both the Senate and the House fully understood and approved of the broad scope of § 1981, and its relationship to Title VII.

In the Senate, Senator Hruska introduced an amendment which would have made Title VII the exclusive remedy for employment discrimination. 118 Cong. Rec. 3172 (1972). He argued that current law permitted "a multiplicity of actions to be instituted against a respondent before a number of separate and distinct forums for the same alleged offense." *Id.* at 3172. He used as an example "a black female employee" complaining of discrimination with regard to "denial of

⁸⁶ The lower court cases from 1968 to 1972 are set out in Appendix B.

⁸⁷ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 108.

either a promotion or a pay raise" by her union and employer. *Id.* at 3368. He noted that among other remedies, the employee could "completely bypass both the EEOC and the NLRB and file a complaint in Federal court under the provisions of the Civil Rights Act of 1866 against both the employer and the union." *Id.* at 3173. Senator Hruska argued that the availability of such multiple remedies "could result in the virtual bankruptcy of a small employer or labor organization." *Id.* at 3172.⁸⁸ Thus, there can be no doubt that the Senator was referring to actions against private defendants and that he understood § 1981 to cover the terms and conditions of employment.

⁸⁸ Senator Hruska also contended that the availability of a "hodge-podge," 118 Cong. Rec. at 3368, of multiple remedies "dissipated" the EEOC conciliation process, *id.* at 3172, 3368, and discouraged voluntary compliance, *id.* at 3361. He urged that his amendment be adopted to correct these "confusing and chaotic conditions," *id.* at 3369.

Senator Hruska's proposal was forcefully rejected by Senator Williams, the floor manager of the bill.⁸⁹ Senator Williams emphasized that the Hruska amendment "would be inconsistent with our entire legislative history of civil rights."⁹⁰ He noted that the 1972 bill "is an improvement [on the 1964 Act] which is premised on the continued existence and vitality of other remedies for employment discrimination." *Id.* at 3371. Senator Williams went on to discuss the interrelationship between

⁸⁹ This objection to the Hruska amendment was shared by the executive branch. During hearings on the 1972 amendments, Assistant Attorney General David Norman testified:

[W]e are concerned that ... there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination."

Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617 and H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. 163 (1971) (quoted at 118 Cong. Rec. 3369).

⁹⁰ See also *id.* at 3371 (Hruska amendment "would severely weaken our overall effort to combat the presence of employment discrimination").

Congress and the courts in "a concentrated effort to eliminate the presence of this national blight":

The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871.

*Id.*⁹¹

Both Senator Williams and Senator Javits emphasized the benefits of retaining the § 1981 remedy against private employers. Senator Williams argued that "[t]he peculiarly damaging nature of employment discrimination is such that the individual, who is frequently forced to face a large and powerful employer, should be accorded every protection that the law has in its purview, and that the person should not be forced to

⁹¹ See also *id.* at 3371 ("It is not our purpose to repeal existing civil rights laws."), 3372 ("We are dealing with a problem in this country that needs all available resources ... One way to reach [this problem] is not to strip from [the victim of discrimination] his rights that have been established, going back to the first Civil Rights Law of 1866").

seek his remedy in only one place." *Id.* at 3372. He also noted that the other remedies are needed to provide relief in situations that Title VII does not cover. *Id.*

Senator Javits was even more explicit regarding the specific benefits of retaining "the possibility of using civil rights acts long antedating the Civil Rights Act of 1964." *Id.* at 3370. He pointed out that these "other remedies are not surplusage." *Id.* at 3961. Rather, they provide a "valuable protection" to address "a given situation which might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964." *Id.* at 3370. Such "interstices" included "cases in which third parties have been guilty of bringing about the discrimination." *Id.* at 3962.⁹² The Hruska amendment was rejected twice by the Senate. *Id.* at 3373, 3965.

In the House of Representatives, the Committee

⁹² The bill's sponsors concluded that it would be better to abandon the Bill than to permit it to become a vehicle for repealing § 1981 and other remedies. *Id.* at 3963.

Report "emphasize[d] that the individual's right to file a civil action in his own behalf, pursuant to [§ 1981] is in no way affected."⁹³ 92d Cong., 1st Sess. 18. This Report cited "[t]wo recent court decisions," which applied § 1981 to private employment discrimination,⁹⁴ as affirming the "Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two

⁹³ The House Report concluded: "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. No. 238, at 18-19.

The Senate Report is consistent, stating:

"The committee would also note that neither the above provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws."

S. Rep. No. 415, 92d Cong., 1st Sess. 24 (1971).

⁹⁴ *Sanders v. Dobb-Henry, Inc.*, 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971), and *Young v. I.T.A.T.*, 438 F.2d 757 (3d Cir. 1971).

procedures augment each other and are not mutually exclusive." *Id.* at 19.

On the floor of the House, the "Erlenborn substitute" bill was adopted in place of the bill reported by the House Judiciary Committee. The major feature of the Erlenborn substitute was that it provided for court enforcement by the EEOC, rather than for agency "cease and desist" powers. The Erlenborn substitute also included a provision to make Title VII the exclusive remedy.⁹⁵ The Erlenborn substitute passed in the House by a vote of 200 to 195. *Id.* at 32111. In conference with the Senate, the court enforcement mechanism of the Erlenborn substitute was retained, but the exclusive

⁹⁵ Representative Erlenborn explained that a party who proceeds under the 1964 Act can also file an action "under the old Civil Rights Act of 1866." 117 Cong. Rec. 31973 (1971). Since the 1964 Act covered only private employers, there can be no doubt that Representative Erlenborn was referring to suits against private employers under § 1981. Representative Erlenborn noted that "in our substitute bill ... [t]here would no longer be recourse to the old 1866 civil rights act." *Id.* Critics of the Erlenborn substitute argued that, among other things, the substitute would "repeal[] the Civil Rights Act of 1866." *Id.* at 31978 (Rep. Eckhardt). See also 117 *id.* at 32100 (Rep. Hawkins).

remedy provision was dropped. H.R. Rep. No. 899, 92d Cong. 2d Sess. 17 (1972) (Conference Report). Thus, Congress endorsed the judicial interpretation of § 1981 as extending to private employment discrimination and chose to preserve the § 1981 remedy as an important part of the scheme to eliminate racial discrimination.

Court Decisions: 1973-1976

In 1973, the Court unanimously held that § 1982 prohibited racial discrimination by a private swimming pool club that gave a membership preference to property owners in a defined geographic area. Tillman v. Wheaton-Harrison, 410 U.S. at 437. The Court again indicated that § 1981 as well as § 1982 covers private discrimination.⁹⁸

In 1975, the Court unanimously held that § 1981 provides a cause of action for private racial discrimination

in employment. Johnson, 421 U.S. at 459-460; *id.* at 468 (Marshall, Douglas & Brennan, JJ., concurring in part and dissenting in part). The Court cited many of the lower court decisions that had reached this conclusion. 421 U.S. at 459 n.6.

In deciding that the statute of limitations on a § 1981 claim of employment discrimination is not tolled while an administrative charge under Title VII was pending, the Court in Johnson analyzed the relationship between § 1981 and Title VII. Relying in large part on the 1972 legislative history of Title VII, the Court concluded that even though "the filing of a lawsuit [under § 1981] might tend to deter efforts at conciliation, ... these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies."

⁹⁸ "In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently..." 410 U.S. at 440.

421 U.S. at 461.⁸⁷

In June 1976, the Court decided Rumson v. McCrary and McDonald v. Santa Fe Trail Transportation Co. on the same day. With two Justices dissenting in each case,⁸⁸ the Court held in Rumson that § 1981 bars racial discrimination by a private school, 427 U.S. at 172, and held in McDonald that § 1981 bars racial discrimination by a private employer against a white worker, 427 U.S. at 287. The Court in both Rumson and McDonald had the benefit of numerous amicus briefs from the United States and private institutions. The majority and the dissenters produced lengthy opinions that fully considered and discussed the legislative history

⁸⁷ The United States filed a brief in Johnson, which concluded that Congress ... clearly intended that [employees aggrieved by racial discrimination] should be permitted to pursue their rights under both Title VII and Section 1981." Brief for the United States as Amicus Curiae, at 11-12.

⁸⁸ Rumson, 427 U.S. at 192 (White, J., joined by Rehnquist, J., dissenting); McDonald, 427 U.S. at 296 (White, J., joined by Rehnquist, J., concurring in part and dissenting in part). Two Justices concurred in Rumson, 427 U.S. at 187 (Powell, J.); *id.* at 189 (Stevens, J.).

and the prior cases.

Civil Rights Attorney's Fees Awards Act of 1976

In the Fall of 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act. The clarity of Congress' endorsement of § 1981's coverage of private discrimination is established by the sequence of events leading up to the passage of the Fees Act. In 1975, the Court in Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, ruled that attorneys' fees ordinarily may not be awarded absent an explicit statutory authorization. The Court thus overruled a series of lower court decisions that had permitted the recovery of attorneys' fees in cases brought under the various Reconstruction Era Civil Rights Acts, including §§ 1981 and 1982. 421 U.S. at 270, n. 46. On June 25, 1976, the Court decided Rumson and McDonald. In June and September of 1976, the Senate and House committee

reports on the Civil Rights Attorney's Fees Awards Act were issued⁹⁹ and the Act itself was passed by the Senate on September 29 and by the House on October 1, 1976.¹⁰⁰

The specific purpose of the Act was to overrule *Alyssa* insofar as it applied to cases brought under §§ 1981 and 1982 and the other Reconstruction Era civil rights statutes. Thus, the Senate Report noted:

[F]ees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.

⁹⁹ S. Rep. No. 1011, 94th Cong., 2d Sess.; H.R. Rep. No. 1558, 94th Cong., 2d Sess.

¹⁰⁰ Pub. Law No. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988.

S. Rep. No. 1011, at 4.¹⁰¹ The House Report discussed § 1981 and cited with approval the decision in *McDonald v. Santa Fe Trail Transportation Company*, as well as its precursor, *Johnson v. Railway Express Agency*. H.R. Rep. No. 1558 at 4.¹⁰²

During the floor debates on the availability of attorneys' fees, the existence of a cause of action under § 1981 for private discrimination was recognized.¹⁰³ Representative Drinan, the floor leader in the House,

¹⁰¹ The Senate Report also incorporated by reference a list of cases summarized in *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. of Criminal Justice of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. III, pp. 886-1024, 1060-62 (1975). S. Rep. No. 1011, at 4 n.3. A number of these cases were actions brought under §§ 1981 and/or 1982 against private parties. *Hearings* at 949, 953, 957-963, 966.

¹⁰² The House Report similarly cited and discussed with approval the Court's decisions in *Tillman* and *James*. H.R. Rep. No. 1558 at 4.

¹⁰³ See 122 Cong. Rec. 35126 (1976) (Rep. Pelt) (citing *Lutz v. Southern Home Sites*, 429 F.2d 290 (5th Cir. 1970) and *Brown v. Ballou*, 331 F. Supp. 1033 (N.D. Tex. 1971)); id. (Rep. Kastenmeier) (citing case of "the family of a veteran of the U.S. Army who could not be buried in a local cemetery because his skin was black" [*Terry v. Elmwood Cemetery*, 307 F. Supp. 309 (N.D. Ala. 1969)]).

emphasized that §§ 1981 and 1982 and the other statutes to which the bill would apply:

generally prohibit the denial of civil and constitutional rights in a variety of areas, including contractual relationships, property transactions, and federally assisted programs and activities. [The Fees Act] would not make any substantive changes in these statutory provisions. Whatever is presently allowed or forbidden under them would continue to be permitted or proscribed.

122 Cong. Rec. at 35122.¹⁰⁴

The Fees Act itself refers specifically to §§ 1981 and 1982. 42 U.S.C. § 1988. The express purpose of the Fees Act was to provide an additional incentive to plaintiffs to vindicate the rights guaranteed by §§ 1981 and 1982 and the other Reconstruction Era civil rights statutes. S. Rep. No. 1011 at 2-3; H.R. Rep. No. 1558 at 2-3. The only possible reason for Congress' inclusion of §§ 1981 and 1982 within the Fees Act is to encourage plaintiffs to use those sections to remedy private

¹⁰⁴ See also 122 Cong. Rec. at 31472 (Sen. Kennedy).

discrimination. Section 1983, which is also covered by the Fees Act, provides a cause of action with respect to governmental action that violates § 1981 or 1982. Thus, if §§ 1981 and 1982 did not reach private action, their inclusion in the Fees Act would be redundant.

Court Decisions Since 1976

Since 1976, the prohibition of private racial discrimination by §§ 1981 and 1982 has been treated as well-settled by all members of the Court participating in such cases.¹⁰⁵

...

¹⁰⁵ *Memphis v. Greene*, 451 U.S. at 120 (majority), 147 (dissenting opinion); *General Building Contractors v. Pennsylvania*, 458 U.S. at 387 (majority), 406 (concurring opinion) (1982); *St. Francis College v. Al-Kharaji*, 107 S. Ct. at 2026 ("petitioner college, although a private institution, was ... subject to [§ 1981's] statutory command"); *Shaw v. Triffin Construction v. Cobb*, 107 S. Ct. at 2021; *Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2025 ("courts below ... properly construed and applied ... § 1981" in finding private union liable). See also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 652 (1979) (White, J., concurring) (remedies for violations of §§ 1981 and 1982 "applicable to private deprivations as well as deprivations under color of state law"); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 107 S. Ct. 2494 (1987) (ruling on prevailing party's right to recover cost of expert witness in context of a § 1981 employment discrimination lawsuit against a private defendant).

This chronology makes clear that for almost a quarter of a century, Congress has fashioned modern civil rights laws with a detailed understanding of judicial decisions regarding §§ 1981 and 1982, and in reliance on that case law. These events reveal a tremendous depth of understanding by Congress of the meaning and significance of the Court rulings. Congress, in legislating on the subject of civil rights, did not have simply an abstract idea that some other overlapping remedies might exist. Instead, Congress understood the details and nuances of Reconstruction Era remedies and their relationship to modern enactments. Congress knew, and considered it desirable, that § 1981 provides a remedy where the statute of limitations has run under Title VII; that § 1981 covers employers too small to be included in Title VII; that a claimant can go directly into court under § 1981 or § 1982; that § 1981 has fewer "technical prerequisites" than Title VII; and that the procedures and

remedies are different under § 1982 and the Fair Housing Act.

The chronology also makes clear that Congress adopted the body of law interpreting §§ 1981 and 1982, including application of those provisions to the terms and conditions of employment. That application of § 1981 was first approved by the Court in *Jones*, which held that § 1981 prohibits racially motivated private interference with performance of an employment contract.¹⁰⁸ Following *Jones*, several of the early lower court rulings applied § 1981 to racial discrimination in the conditions of employment, such as discrimination in work assignments and racial harassment. For example, in *Young v. I.T.A.T.*, 438 F.2d 757 (3rd Cir. 1971), the plaintiff alleged that § 1981 was violated when he was

¹⁰⁸ The Court concluded that where "a group of white men had terrorized several Negroes to prevent them from working in a sawmill -- there was no doubt that the [whites] had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract," in violation of § 1981. 392 U.S. at 441-42, n. 78 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

harassed "maliciously and wantonly" by his union and employer.¹⁰⁷

When Congress amended Title VII in 1972, it clearly understood that discrimination in the terms and conditions of employment is prohibited by § 1981. One of the cases cited by the House Report as affirming that § 1981 is "coextensive" with Title VII was Young v. LT&T, which involved application of § 1981 to a claim of racial harassment. Significantly, the Title VII remedies to which the § 1981 "right to sue" is "coextensive" include protection against discrimination in the "terms and conditions of employment." 42 U.S.C. § 2000e-2

¹⁰⁷ Accord Bourdreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) (applying § 1981 to claim that undesirable jobs were always assigned to blacks); Long v. Ford Motor Co., 496 F.2d 500, 505-506 (5th Cir. 1974) (§ 1981 applies to claim of discrimination in training). See also United States v. Medical Society of South Carolina, 298 F. Supp. 145, 148-149 (D.S.C. 1969) (private hospital's segregation of outpatients); Fiedler v. Marymount Christian School, 631 F.2d 1144 (4th Cir. 1980) (private school policy prohibiting interracial romantic relationships).

(1982).¹⁰⁸ Also in 1972, Senator Hruska's example of a lawsuit under § 1981 for salary discrimination shows that he understood the scope of § 1981 to be broader than did the Fourth Circuit in this case.

The Court in Johnson cited two cases that applied § 1981 to a claim of discriminatory terms and conditions of employment. 421 U.S. at 459 n.6 (citing Young v. LT&T), 457 n.4 (citing Bourdreaux v. Baton Rouge Marine Contracting Co.). Significantly, the plaintiff's claims in Johnson primarily concerned racial harassment and other racial discrimination in the terms and conditions of employment. See 421 U.S. at 455 (seniority rules and job assignments). The petitioner's brief opened with the statement: "Petitioner Willie Johnson, Jr., is a black man who claims to have been subjected by

¹⁰⁸ This protection had been construed prior to 1972 to encompass racial harassment on the job. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

respondents to racial discrimination in the terms and conditions of employment." Brief for Petitioner at 2 (emphasis added). The Complaint alleged, *inter alia*, that the employer "assigns, reassigns, promotes and otherwise acts or fails to act" in a discriminatory manner. Supreme Court Appendix at 6a (Complaint ¶ V(2)).¹⁰⁹ In amending the Fees Act in 1976, Congress explicitly relied upon the *Johnson* decision, as discussed above.

IV.

THE DOCTRINE OF STARE DECISIS COMPELS REAFFIRMATION OF THE DECISIONS IN *RUNYON* AND *JONES*

Petitioner explains in Parts I and II above that *Runyon* and *Jones* are consistent with the intent of Congress when it enacted, reenacted and codified §§ 1981 and 1982. But even without revisiting the merits of the

¹⁰⁹ The EEOC Final Investigative Report, attached to the Complaint, described a variety of allegations, including racial harassment of Willie Johnson, "more severe" work orders and discipline for black employees and "dual standards, based on race, for conditions of employment and disciplinary action." Supreme Court Appendix at 22a, 30a.

Runyon and *Jones* decisions, the doctrine of *stare decisis* mandates that those decisions be retained.

"[T]he doctrine of *stare decisis* is ... a powerful force in our jurisprudence..." *United States v. Maine*, 420 U.S. 515, 527 (1975).¹¹⁰ Among the "weighty considerations" that underlie the doctrine are "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). This doctrine applies with most

¹¹⁰ Accord *Welch v. State Dept. of Highways*, 403 U.S. ___, 107 S. Ct. 2941, 2956-57 (1987) ("the doctrine of *stare decisis* is of fundamental importance to the rule of law"); *Younger v. Hilkey*, 474 U.S. 254, 265-266 (1985); *Miller v. Fenton*, 474 U.S. 104, 115 (1985); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

force in situations where the Court has definitively construed a federal statute.¹¹¹

A. Widespread Reliance on *Ramton* and *Jones* Strongly Supports Reaffirmation of Those Decisions.

The case for stare decisis is compelling where, as here, Congress has relied and built upon the Court's precedents in enacting subsequent legislation.¹¹² As discussed above, Congress' actions in approving and building upon the rulings in *Ramton* and *Jones* are much

¹¹¹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [the] Court's interpretation of its legislation"); *Accord* *HLER v. Longshoreman*, 471 U.S. 61, 64 (1985); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 n.5 (1985); *Basil v. United States*, 446 U.S. 388, 404 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring in the judgment). Even in the area of constitutional interpretation, stare decisis plays a very large role. See, e.g., H. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1980).

¹¹² See, e.g., *Miller v. Fenton*, 474 U.S. at 115 (1985) (relying on the "benefit of some congressional guidance" in declining to overturn a prior ruling); *Futon v. Florida Board of Regents*, 457 U.S. 496, 501 (1982) (factor in applying stare decisis is "whether overruling [a prior decision] would be inconsistent with more recent expressions of congressional intent"); *Mumill v. New York City Dept. of Social Services*, 436 U.S. 458, 475 (1978). See also *Quinn D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 479, 422 (1986).

stronger than the congressional actions (or inactions) found determinative in any other case.

Widespread reliance upon *Ramton* and *Jones* has occurred at every level of government and private activity. The Solicitor General filed a brief on behalf of the United States as amicus curiae in *Jones v. Mayer*, *Sullivan v. Little Hunting Park*, *Tillman v. Wheaton-Haven*, *Johnson v. Railway Express Agency*, *Ramton v. McCray*, and *McDonald v. Santa Fe*, arguing in each case for broad coverage of private discrimination under §§ 1981 and 1982. The brief in *Ramton* indicated that the Attorney General and the Department of Health, Education and Welfare, have significant responsibilities for "efforts to desegregate public educational systems," and that these efforts "may be seriously impaired" "[i]f private schools may lawfully deny admission to black children on account of race." Brief for U.S. as Amicus Curiae, at 2-3. In the instant case, the United States

explained that 'the availability of remedies under 42 U.S.C. 1981 for acts of racial discrimination in employment affects the degree of compliance with, and allocation of government resources in enforcing, the proscriptions of Title VII.' Brief for U.S. as Amicus Curiae, at 2.¹¹³

State and local governments also have built upon the rights provided under *Ramton* and *Jones* in structuring their own remedies and enforcement activities.¹¹⁴ Attorneys have relied upon *Ramton* and *Jones* in advising clients.

The victims of racial discrimination also have legitimately relied upon the rights provided under *Jones* and *Ramton*. The situation of petitioner, Brenda

¹¹³ The United States also stated: 'It is now well established that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts, including contracts of employment.' *Id.* at 6.

¹¹⁴ *See* Brief of New York, 46 Other States, the District of Columbia, Puerto Rico and the Virgin Islands, as Amici Curiae.

Patterson, illustrates the type of detrimental reliance that is likely to have occurred with many victims of racial discrimination. Mrs. Patterson could have brought her racial harassment and promotion discrimination claims against McLean Credit Union under Title VII.¹¹⁵ She chose to sue under § 1981 and to forego the Title VII claims.¹¹⁶ Reasonably relying on the availability of a remedy under § 1981, Mrs. Patterson let the short statute of limitations expire on her Title VII claim.¹¹⁷ If the Court now overrules *Ramton*, Mrs. Patterson will be left without any remedy for either her harassment claim or her promotion claim.

¹¹⁵ Mrs. Patterson filed a timely charge with the EEOC and received a right to sue letter. Record, Exs. 2 and 3 to Defendant's Brief in Support of Motion for Summary Judgment.

¹¹⁶ Mrs. Patterson would not have been entitled to a jury trial or to compensatory and punitive damages under Title VII. A major element of Mrs. Patterson's claim was discrimination in the terms and conditions of her employment, for which Title VII provides no monetary remedy.

¹¹⁷ Title VII requires that the recipient of a right to sue letter bring suit within 90 days. 42 U.S.C. § 2000e-5(f)(1) (1982).

The doctrine of stare decisis is in large part a recognition that individuals and institutions reasonably rely on judicial decisions.¹¹⁸ The reliance of governmental actors and the public is especially justified in the case of the *Rumson* and *Jones* decisions. Each of those cases was decided with only two dissenting votes and has been reaffirmed repeatedly, including three unanimous decisions as recently as 1987.

B. *Rumson* and *Jones* Resulted From Thorough Analysis.

The doctrine of stare decisis is particularly strong where the precedent at issue resulted from thorough briefing and careful analysis¹¹⁹ and no new evidence casts doubt on the Court's original conclusion. The *Rumson* and *Jones* decisions resulted from a careful, deliberative

¹¹⁸ E.g., *Grain Processing Corp. v. Donlin*, 471 U.S. at 819 n.3; *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272.

¹¹⁹ Compare, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 732 (1984) (overruling antitrust precedent where doctrine was never analyzed in depth and was not necessary to result).

process. Those who disagree with the Court's reading of that history do not believe that *Rumson* or *Jones* was clearly wrong.¹²⁰ Justice White's reasoning in *Patry* with regard to the exhaustion requirement under § 1983, applies equally well to the current situation:

For nearly 20 years and on at least 10 occasions the Court has clearly held that [§§ 1981 and 1982 prohibit private discrimination]. Whether or not this initially was a wise choice, these decisions are stare decisis, and in a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history.

457 U.S. at 517 (concurring opinion).

C. No 'Special Justification' Exists For Overruling *Rumson* or *Jones*.

Because of the strong societal interests in the doctrine of stare decisis, there is a 'presumption of adherence to ... prior decisions construing legislative

¹²⁰ *Jones*, 392 U.S. at 430 (Harlan, J., joined by White, J., dissenting) (Court's construction 'at least is open to serious doubt'), 452-453 ('there is an inherent ambiguity in the term "right" as used in § 1982'), 454 ('debates do not ... overwhelmingly support the result reached by the Court, and ... a contrary conclusion may equally well be drawn').

enactments." Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). Even in the constitutional context, the overruling of a precedent is an "exceptional action," which must be supported by "special justification." Arizona v. Rumson, 467 U.S. 203, 212 (1984). No special justification exists to overcome this presumption with respect to Rumson or Jones.

The Court has identified several factors that may in some combination outweigh the interests of stare decisis.¹²² A very important countervailing consideration is whether the precedent under review has proved unworkable or has caused significant harm in its application. In making the determination of workability or harm, the Court generally looks to the experience in applying the decision at issue. Criticism of the precedent

¹²² Counsel for petitioners have located 39 cases in which the Court has overturned a statutory precedent. Those cases are listed in Appendix C. In 33 of those 39 cases, the Court explicitly relied upon either the harm of the prior decision (13 cases) or a subsequent change in the law (20 cases).

by lower courts or commentators also is relevant to this determination.¹²³ For example, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 (1977), the Court overruled United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), because "[s]ince its announcement, Schwinn had been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts."¹²³

Far from causing great harm in application, the Rumson and Jones rulings have produced tremendous benefits. As interpreted in Rumson and Jones, §§ 1981

¹²² E.g., Gulfstream Aerospace Corp. v. Mayacamas Corp., 109 S. Ct. 1133, 1140, 1142 & n.10 (1989) (overruling procedural doctrine based on "[a] half century's experience," which demonstrated that the doctrine was "unworkable," "arbitrary," produced "bizarre outcomes," had been "repeatedly ... lambasted" by the lower federal courts, and had been subjected to "scathing" criticism by commentators).

¹²³ Similarly, in the constitutional context, the Court overturned part of its decision in Ingrain v. Alabama, 380 U.S. 202 (1965), because the experience since Ingrain showed that the rule resulted in placing "on defendants a crippling burden of proof," and making "prosecutors' peremptory challenges ... largely immune from constitutional scrutiny." Batson v. Kentucky, 476 U.S. 79, 92-93 (1986). See also *id.* at 101 (White, J., concurring) (experience under Ingrain showed that discriminatory use of peremptory challenges "remains widespread").

and 1982 have played a vital role in the national effort to eliminate intentional racial discrimination. Sections 1981 and 1982 provide a remedy for discriminatory conduct in many situations where no other federal statute operates. For example, § 1981 has played a critical role in preventing discrimination by private schools.¹²⁴ Such discrimination "is contrary to fundamental public policy." *Bob Jones*, 461 U.S. at 592. Private schools which receive no federal funds are subject to no other federal anti-discrimination statute. The application of § 1981 to

¹²⁴ See e.g., *Endler v. Marquette Christian School*, 631 F.2d 1144 (4th Cir. 1980) (white student expelled for talking to black students); *Brown v. Dade Christian Schools, Inc.*, 576 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (refusal to admit black students); *Riley v. Allendale Southern School for Girls*, 541 F.2d 1124 (5th Cir. 1976) (refusal to admit black student). See also *Albert v. Caravano*, 824 F.2d 1333 (2d Cir. 1987) (unequal discipline by private college); *Grigg v. Specialized Skills*, 526 F. Supp. 856 (W.D.N.C. 1971) (barber school).

In addition to the cases actually litigated under § 1981, other private schools have voluntarily modified their policies in light of *Ramton*. For example, following the Fourth Circuit's ruling in *Ramton*, 515 F.2d 1082 (1975), Bob Jones University revised its policy and permitted unmarried blacks to enroll. *Bob Jones*, 461 U.S. at 593. In the absence of coverage under § 1981, many private schools are likely to revert to their prior racially exclusionary policies.

private schools is essential not only to guarantee equal access to the educational opportunities provided by such schools, but also to prevent private segregation academies from undermining the desegregation process in the public schools.¹²⁵

Sections 1981 and 1982 also provide a cause of action for intentional discrimination by insurance companies,¹²⁶ commercial day care centers,¹²⁷ private cemeteries and mortuaries,¹²⁸ contractors and franchisers,¹²⁹ certain private clubs,¹³⁰ private

¹²⁵ See Brief for United States as Amicus Curiae, *Ramton v. McCrary*, at 2-3. See also *Norman v. Harrison*, 413 U.S. 455, 457, 467 & n.9 (1973).

¹²⁶ *Sims v. Order of United Commercial Travelers*, 343 F. Supp. 112 (D. Mass. 1972); *Ortega v. Merch Insurance Co.*, 433 F. Supp. 135 (N.D. Ill. 1977).

¹²⁷ *Darzenbourg v. Dafranc*, 460 F. Supp. 662 (E.D. La. 1978).

¹²⁸ *Scott v. Everade Mortuary*, 522 F.2d 1110 (9th Cir. 1975); *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969).

¹²⁹ *Sud v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W. D. Mich. 1964).

homeowners¹³¹ and employers with fewer than 15 employees.¹³² No other federal statute provides a cause of action to combat these types of private, non-federally-funded invidious racial discrimination.

Additionally, §§ 1981 and 1982 afford an important remedy against third-party interference with the enjoyment of contract or property rights.¹³³ For example, § 1981 was held to prohibit Ku Klux Klan use of

¹³⁰ (...continued)

¹³⁰ *Tillman v. Wheaton-Haven; Sullivan v. Little Hunting Park; Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir. 1980); *Johnson v. Brass*, 472 F. Supp. 1056 (E.D. Ark. 1979); *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182 (D. Conn. 1974).

¹³¹ The Fair Housing Act exempts from coverage certain sales or rentals of single family homes by an owner and certain rooms or units in dwellings occupied by the owner and by four or fewer families. 42 U.S.C. § 3603(b). See *Johnson v. Zaremba*, 381 F. Supp. 165 (N.D. Ill. 1973) (applying § 1982 to owner-occupied dwelling with less than four units).

¹³² Title VII exempts from coverage employers with fewer than 15 employees. 42 U.S.C. § 2000e-1(b).

¹³³ Protection against this type of discrimination was one of Congress' concerns when it enacted § 1 of the Civil Rights Act of 1866, see Part II above, and was one of the reasons that Congress rejected proposals to repeal §§ 1982 and 1983, see 118 Cong. Rec. at 3062 (Sen. Javits).

intimidation tactics, such as cross-burning, for the purpose of discouraging Vietnamese fishermen from contracting with dock owners. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Texas 1981). Similarly, a black former student at the Citadel is suing white students for harassment and intimidation because of his race. Second Amended Complaint ¶ 22, *Nesmith v. Grimley*, No. 2-86-3248-8 (D.S.C.).¹³⁴ And, pursuant to the Court's 1987 decision in *Shaare Tefila*, § 1982 is being used to remedy race-based desecration of a synagogue.

In addition to filling in gaps in the coverage of federal anti-discrimination statutes, §§ 1981 and 1982 provide important supplemental procedures and remedies in areas where other federal statutes operate. A trial by

¹³⁴ This harassment, which interfered with the black student's right to enjoy the benefits of his contract for a college education, included an incident in which five white students "entered [his dormitory] room dressed in sheets and towels resembling Ku Klux Klan attire, chanted threatening remarks ... and left behind a burned paper cross." *Id.* at ¶ 18.

jury is guaranteed in actions for legal damages under §§ 1981 and 1982. In contrast, a jury trial is not available under Title VII. Full legal remedies, including compensatory and, in appropriate cases, punitive damages, may be awarded for violations of §§ 1981 and 1982. Title VII monetary relief is limited to backpay, and punitive damages under the Fair Housing Act are limited to \$1,000. The availability of compensatory and punitive damages is especially important in cases of racial harassment, where the plaintiff may not have suffered any loss of wages and would be entitled to no monetary remedy under Title VII.

The fact that multiple remedies with differing procedures are available in some situations to redress racial discrimination is itself a positive benefit, as has been recognized by the Court, Congress and the Executive Branch. Moreover, the existence of multiple

remedies has not produced problems of workability.¹³⁵ Instead, the federal courts have, for almost twenty years, routinely applied §§ 1981 and 1982 to allegations of private discrimination, without fanfare or complaint. The major substantive¹³⁶ and procedural¹³⁷ questions now have been settled by definitive rulings from this Court or by a consensus among the lower courts.¹³⁸ The federal agencies charged with enforcement of statutes that

¹³⁵ Senator Hruska argued in 1972 that the existence of multiple remedies would harm employers. Senator Javits responded that these theoretical problems had not occurred in actual experience, 118 Cong. Rec. at 3370, and Congress rejected the Hruska amendment.

¹³⁶ E.g. *General Building Contractors v. Pennsylvania*, 458 U.S. at 391 (intentional discrimination required); *Saint Francis College v. Al-Kharraji*, 107 S. Ct. at 2022 (discrimination on basis of ancestry covered); *McDonald v. Santa Fe*, 427 U.S. at 280 (discrimination against whites covered).

¹³⁷ E.g. *Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2021 (statute of limitations); *Johnson v. Railway Express Agency*, 421 U.S. at 460, 463-464 (no tolling; compensatory and punitive damages available).

¹³⁸ The lower courts have used the rules of proof of intentional discrimination developed under the Constitution and other federal statutes. E.g. *Whiting v. Jackson State University*, 616 F.2d 116 (5th Cir. 1980) (elements of violation are identical under § 1981, § 1983 and Title VII disparate treatment claim).

overlap with §§ 1981 and 1982 have consistently maintained that the Reconstruction Era remedies complement the governmental procedures.¹³⁹

The availability of a cause of action under §§ 1981 and 1982 for racial harassment or discrimination in the terms and conditions of performance of a contract also creates no workability problems. Such causes of action have been routinely handled by the federal courts under §§ 1981 and 1982 at least since 1969,¹⁴⁰ and have been

¹³⁹ See, e.g., United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D.S.C. 1969) (Attorney General lawsuit enforcing, *inter alia*, § 1981); Brief of the Equal Employment Opportunity Commission as Amicus Curiae, Keller v. Prince Georges Co., 827 F.2d 952 (4th Cir. 1987) (Title VII did not preempt Reconstruction Era remedies).

¹⁴⁰ E.g., United States v. Medical Society of South Carolina, 298 F. Supp. at 148-149 (racially segregated waiting rooms in private hospital); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d at 1016 (racial discrimination in job assignments); Young v. I.T.A.T., 438 F.2d at 757 (racial harassment in employment); Clark v. Universal Builders, Inc., 409 F. Supp. 1274 (N.D. Ill. 1976) (racially discriminatory prices and terms in home sales). See also cases cited in Brief for Petitioner at 35 nn. 12 & 13.

recognized for many years under Title VII.¹⁴¹

Another factor that can constitute a countervailing force to the doctrine of stare decisis is an intervening change in the law, either through legislation or subsequent court decisions. No such change has occurred with respect to Rumyon and Jones. As discussed above, subsequent legislative developments strongly support continued adherence to Rumyon and Jones.

¹⁴¹ See, e.g., Merritor Savings Bank v. Vinson, 91 L. Ed. 2d 49 (1986) (sexual harassment actionable under Title VII; relies on racial harassment cases in lower courts); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (racially offensive work environment); Firefighters Institute v. City of St. Louis, 549 F.2d 506, 514-515 (8th Cir.), cert. denied *sub nom.* Banta v. United States, 434 U.S. 819 (1977) (racially discriminatory supper clubs on employer's premises violates Title VII).

Conclusion

For the reasons stated, the Court should reaffirm the holding in Runyon that § 1981 prohibits wholly private, contractual discrimination on the basis of race.

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APPENDICES

APPENDIX A

Newspaper Articles Concerning The Application of 1866 Civil Rights Act to Private Contacts

(1) Washington Intelligencer, March 24, 1866

"The 'Civil Rights' Bill"

"2. It establishes negro superiority. . . . It would be an offense to recognize in state law, or even in private contract, a distinction of color or race 'under color of any custom'. This is, we believe, an unprecedented provision. It carries Federal interference into privacies into which the most local and domestic laws never intrude. It might -- nay, does -- daily happen, that bargains are made between whites and colored men which are indispensable to the well-being of the latter, yet which would be unintelligible without recourse to the custom of

distinguishing on account of race or color -- an observance of which is made penal by this statute. . . . Let us consider how this provision would operate. For example, at a public sale of pews in a church, a negro or a Chinaman born in this country might offer the highest bid. The custom of the church might be against selling to one of either race or color, and if the bidder should bring an action in the state court, there is no doubt he would fail to establish a right to the pew. But here is a right withheld on account of race or color [A] negro, though an infidel, could enforce his right as the highest bidder, in spite of the Congregation, the courts, the people, and the whole state itself. . . .

"Again: at hotels, what landlord would venture upon enforcing the customs of his hotel

against negroes? [I]f the wrong be done to a negro, however bestial or ignoble, the excuse that it was done under color of custom would aggravate the offense; and the greatest military power on earth could be invoked for the punishment of a publican. . . ."

(2) Cincinnati Commercial, March 30, 1866

"The Civil Rights Bill"

. . . .

"Politicians must admit that there still exists, in some quarters, among white folks, a prejudice against the colored people. This may be a mean thing to appeal to, and [we] wouldn't appeal to it, but we mention the fact. The prejudice of which we speak is developed in objections to allowing negroes to own pews in the churches, or to seating themselves without consulting the color of their neighbors, in

churches, concert halls or theaters, in the dining-rooms of hotels, and elsewhere in the congregation of the people.

"Colored schools are established, and there are persons, who are not traitors, who think it would not be well to mix the white and black children in the same school rooms. We do not know that either would be hurt by the process, but the prejudice against such a mixture is, perhaps, pretty strong. How many wards of Cincinnati, for instance, would cast large majorities for the re-election of General HAYES and BENJAMIN EGGLESTON to Congress, upon the ground that they had assisted in passing over the President's veto a measure that opened the schools where the white children are being educated to the blacks, and not only opened the schools but the churches, theaters and hotels,

making all distinctions against any color anywhere, according to the established customs of our society, a crime, punished with severe penalties?"

(3) Indianapolis Daily Herald, April 17, 1866
(p. 2, col. 1)

"The Negro Rights Act"

. . .

"No one can read these provisions of the law, and doubt that its design and purpose, so far as legislation can accomplish it, is to make the negroes fully equal to the white citizens. And what will be its practical effect? . . . [D]oes it not [make] the negro [on an equal footing] in all respects? Under the act can the proprietors of a hotel, of a place of amusement, of a railroad, make any distinction on account of color or race? If a negro should go to the

Palmer House and thrust himself upon the guests in the dining room, would not the proprietor subject himself, under the new law, to damages, if he should forcibly eject him from the premises, or refuse to allow him the same privileges as other guests? Could not a negro, if refused an unoccupied seat at any place of amusement, subject the proprietor to damages for the assault upon his dignity and rights? If there should be a public letting of pews at any of our churches, would not the negro have the right to have his bid respected, if it should be the highest? And could a negro be ejected from any unoccupied seat in a railroad car?

"During the canvass preceeding the last two presidential elections, the Republicans denied most stoutly and indignantly that they tolerated any such idea as negro equality. But

what is the result? A law . . . to break down all distinctions between races and color

"We regard this attempt by legislation to lift the negro to the same level with the white race, to overcome the prejudices of color and race by legal enactments, as unwise and detrimental to the best interests of the blacks. The antagonism of the races, which is deep seated, will only be developed and intensified by such laws But such is Republicanism."

APPENDIX B

Lower Court Cases Applying §§ 1981 and 1982 to Private Discrimination: 1968-1972

1968: Newburn v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio) (lot in housing development).

1969: Scott v. Young, 307 F. Supp. 1005 (E. D. Va.), aff'd, 421 F.2d 143 (4th Cir.), cert. denied, 398 U.S. 929 (1970) (amusement park admissions policy); Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969) (burial plots in private cemetery); United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D.S.C.) (discrimination in hospital admissions; segregation of patients).

1970: Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (private employment discrimination); Sanders v. Dobbs House, 431 F.2d 1097 (5th Cir.), cert. denied, 401 U.S. 948 (1971) (employment).

1971: Young v. I.T.&T., 438 F.2d 757 (3d Cir.) (employment); Caldwell v. The National Brewing Co., 443 F.2d 1044 (5th Cir.) (employment); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir.) (employment); Grier v. Specialized Skills, 326 F. Supp. 856 (W.D.N.C.) (admission to professional barber school; refusal to serve black customers).

1972: Brady v. Bristol-Meyers, Inc. 459 F.2d 621 (8th Cir.) (employment); Brown v. Gaston County Dyeing Machine Co. 457 F.2d 1377 (4th Cir.) (employment); Sims v. Order of United Commercial Travelers 343 F. Supp. 112 (D. Mass.) (insurance).

APPENDIX C

STATUTORY PRECEDENTS OVERRULED¹

Statutory Precedent Overruled Because of Harm or Unworkability

1. Gulfstream Aerospace Corp. v. Mayacamas, 108 S. Ct. 1133, 1140 (1988), overruling Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942) and Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935) ("A half century's experience has persuaded us ... that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals").
2. United States v. Ross, 456 U.S. 798, 803 (1982), overruling Robbins v. California, 453 U.S. 420 (1981) (lower courts were divided and confused on the meaning of the Court's decisions and "[t]here is ... no dispute among judges about the importance of striving for clarification in this area of the law"); *id.* at 825 (Blackmun, J., concurring); *id.* at 826

¹ The cases included in Appendix C are those identified by counsel for petitioner as involving a statutory precedent from the list of overruled cases in The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 99-16, 99th Cong., 1st Sess. 2117-2127 (J. Killian ed. & L. Beck assoc. ed. 1987) and S. Doc. No. 100-9, 100th Cong., 1st Sess. 143 (Supp. 1987), as well as cases in which a statutory precedent was overruled after the date of the 1987 Supplement. Cases in which a prior decision was overturned on rehearing of the same case are omitted.

(Powell, J., concurring).

3. Continental v. GTE Sylvania, 433 U.S. 36, 47 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) ("Schwinn has been the subject of continuing controversy and confusion").

4. Boys Markets v. Retail Clerks Union, 398 U.S. 235, 241 (1970), overruling Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) ("it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national labor policy").

5. Lee v. Florida, 392 U.S. 378, 385-386 (1968), overruling Schwartz v. Texas, 344 U.S. 199 (1952) (decision based on changes in federal constitutional law and "counseled by experience" showing that the prior decision was ineffective).

6. Peyton v. Rowe, 391 U.S. 54, 61-62 (1968), overruling McNally v. Hill, 293 U.S. 131 (1934) (the "harshness of [the McNally rule] becomes obvious when applied to the cases of Rowe and Thacker" and demonstrates that the rule "can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice").

7. Swift & Co. v. Wickham, 382 U.S. 111, 116, 124-25 (1965), overruling Kesler v. Department of Public Safety, 369 U.S. 153 (1962) (prior interpretation of three-judge court statute

"proved to be unworkable in practice," produced "mischievous consequences," created "uncertainty" and difficulties in application by the lower courts and was "uniformly criticized by commentators").

8. Eay v. Noia, 372 U.S. 391, 435, 437 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950) ("the expectation [of the prior ruling] has not been realized in experience" and instead the rule "has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims" that has "impeded" the "goal of prompt and fair criminal justice" and "unwarrantably taxed the resources of this Court").

9. James v. United States, 366 U.S. 213, 221 (1961), overruling Commissioner v. Wilcox, 327 U.S. 404 (1946) (tax law precedent had caused "confusion" in the lower courts and had resulted in "injustice").

10. Brady v. Roosevelt Steamship Co., 317 U.S. 575, 578, 581 (1943), overruling Johnson v. Fleet Corp., 280 U.S. 320 (1930) (prior ruling had resulted in "a substantial dilution of the rights of claimants").

11. Helvering v. Hallock, 309 U.S. 106, 110 (1940), overruling Helvering v. St. Louis Trust Co., 296 U.S. 39 (1935) and Becker v. St. Louis Trust Co., 296 U.S. 48 (1935) (relying on "difficulties which the lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results").

12. Lee v. Chesapeake & Ohio Railway Co., 260 U.S. 653, 659 (1923), overruling Ex parte Wisner, 203 U.S. 449 (1906) ("Much that was said in the opinion [Wisner] was soon disapproved in In re Moore, 209 U.S. 490, where the Court returned to its former rulings ..." and "it has been a source of embarrassment and confusion in other courts").

13. Gazzam v. Phillip's Lessee, 20 How. (61 U.S.) 372, 377-378 (1858), overruling Brown's Lessee v. Clements, 3 How. (44 U.S.) 649 (1845) (adherence to Brown principle "in its practical operation will unsettle the surveys and subdivisions of fractional sections of the public land" and result in "disturbance and confusion").

Statutory Precedent Overruled
Because of Change in Law

1. Monell v. New York City Department of Social Services, 436 U.S. 658, 696 (1978), overruling in part Monroe v. Pape, 365 U.S. 167 (1961) (Monroe holding was inconsistent with prior decisions and with subsequent practice).

2. Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n., 427 U.S. 132, 153 (1976), overruling International Union v. Wisconsin Employment Relations Board (Briggs-Stratton), 336 U.S. 245 (1948) (later decisions made clear that labor law precedent was "inconsistent with the federal regulatory

scheme").

3. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 497 (1973), overruling Ahrens v. Clark, 335 U.S. 188 (1948) ("developments since Ahrens have had a profound impact on the continuing vitality of that decision").

4. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 322 (1972), overruling Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1941) ("Later cases from this Court have repudiated the reasoning advanced in support of the results reached in Moore...").

5. Griffin v. Breckenridge, 403 U.S. 88, 96 (1971), overruling in part Collins v. Hardyman, 341 U.S. 651 (1951) (relying on "evolution of decisional law").

6. Smith v. Evening News Ass'n, 371 U.S. 195, 199 (1962), overruling in part Employees v. Westinghouse Corp., 348 U.S. 437 (1955) ("subsequent decisions ... have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent").

7. Construction Laborers v. Curry, 371 U.S. 542, 552, overruling in part Building Union v. Ledbetter Co., 344 U.S. 178 (1952) (relying on changes in the law concerning pre-emption and jurisdiction of NLRB).

8. Cosmopolitan Co. v. McAllister, 337 U.S. 783, 793 (1949), overruling Hust v. Moore-

McCormack Lines, 328 U.S. 707 (1946) ("[t]he Caldarola case ... undermined the foundations of Hust").

9. Comm'r v. Estate of Church, 335 U.S. 632, 636-637 (1949), overruling May v. Heiner, 281 U.S. 238 (1930) (citing "confusion and doubt as to the effect of our Hallock case on May v. Heiner" and holding "that the Hallock and May v. Heiner holdings and opinions are irreconcilable").
10. Angel v. Bullington, 330 U.S. 183, 192 (1947) overruling David Lupton's Sons v. Automobile Club of America, 225 U.S. 489 (1912) (a subsequent case "drastically limited the power of federal district courts to entertain suits in diversity").
11. Mercoind Corp. v. Mid-Continent Co., 320 U.S. 661, 668 n.1 (1944), overruling Leeds & Catlin Co. v. Victor Talk Mach. (No. 2), 213 U.S. 325 (1909) (relying upon subsequent doctrinal developments and fact that crucial point had been only "adverted to in the briefs" in initial case).
12. EPC v. Hope Gas Co., 320 U.S. 591, 606-607 (1944), overruling United Railways v. West, 280 U.S. 234 (1930) (subsequent decisions eroded precedent).
13. Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 602-605 (1943), overruling Childers v. Beaver, 270 U.S. 555 (1926) (change in law and in status of Indian tribes).

14. Rochester Tel. Corp. v. United States, 307 U.S. 125, 136 & n.13, 140-143 (1939), overruling Procter & Gamble v. United States, 225 U.S. 282 (1912) (subsequent decisions eroded doctrine of prior case).
15. Fox Film Corp. v. Doyal, 286 U.S. 123, 129-130 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928) (subsequent decisions and inconsistent authorities);
16. Chicago & E.I.R. Co. v. Commission, 284 U.S. 296, 299 (1932), overruling Erie R.R. Co. v. Collins, 253 U.S. 77 (1920) and Erie R. R. Co. v. Szary, 253 U.S. 86 (1920) (irreconcilable authorities).
17. Boston Store v. American Graphophone Co., 246 U.S. 8, 25 (1918) and Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 518 (1917), overruling Henry v. Dick Co., 224 U.S. 1 (1912) (conflicting doctrines).
18. Rosen v. United States, 245 U.S. 467, 470 (1918), overruling United States v. Reid, 12 How. (53 U.S.) 361 (1851) (authority of Reid "seriously shaken" by subsequent decisions).
19. Kountze v. Omaha Hotel Co., 107 U.S. 378, 387 (1883), overruling Stafford v. The Union Bank of Louisiana, 16 How. (57 U.S. 135 (1853) ("[s]ubsequent decisions have undoubtedly modified the rule followed in [Stafford] and, indeed, have overruled it").
20. Gordon v. Ogden, 3 Pet. (28 U.S.) 33, 34

(1830), overruling Wilson v. Daniel, 3 Dall. (3 U.S.) 401 (1798) ("contrary practice [has] since prevailed").

Statutory Precedent Overruled Where
Neither Harm Nor Change in Law or
Circumstances Explicitly Given as Reason

1. Copperweld Corp. v. Independence Tube Co., 467 U.S. 752, 760, 766 (1984), overruling United States v. Yellow Cab Co., 332 U.S. 218 (1947) (doctrine had never been analyzed in depth and was unnecessary to result in prior cases).

2. Girouard v. United States, 328 U.S. 61, 64 (1946), overruling United States v. Macintosh, 283 U.S. 605 (1931).

3. Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 139 (1941), overruling Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) ("Loose language and a sporadic, ill-considered decision").

4. Nye v. United States, 313 U.S. 33, 51 (1941), overruling Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

5. United States v. Phelps, 107 U.S. 320, 323 (1883), overruling Shelton v. The Collector, 5 Wall (72 U.S.) 113 (1867).

6. Hornbuckle v. Toombs, 85 U.S. 648, 653, 656-657 (1873), overruling Noonan v. Lee, 2 Bl. (67 U.S.) 499 (1863) and Orchard v. Hughes, 1 Wall. (68 U.S.) 73, 77 (1864) and Dunphy v. Kleinsmith, 11 Wall. (78 U.S.) 610 (1871).

No. 87-107

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

v.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**RESPONDENT'S OBJECTIONS TO MOTION OF
THE AMERICAN BAR ASSOCIATION FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE**

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In The
Supreme Court Of The United States
October Term, 1988

No. 87-107

BRENDA PATTERSON,
Petitioner,
v.
MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the
Fourth Circuit

RESPONDENT'S OBJECTIONS TO MOTION OF
THE AMERICAN BAR ASSOCIATION FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE

Respondent respectfully opposes
the motion by the American Bar
Association (ABA) for leave to file
a brief as amicus curiae for the
following reasons:

1. In its motion for leave to file a brief amicus curiae, the ABA describes itself as follows:

The ABA is a voluntary national organization of lawyers. Its more than 347,000 members come from every state and territory and represent a broad cross-section of the legal profession.

Because of the "broad cross-section of the legal profession" which comprises the membership of the ABA, and because of that membership's diverse interests and views, the ABA has instituted a thorough review procedure which must be followed before the ABA will authorize the filing in its name of a brief amicus curiae. Respondent has reason to believe that the full authorization procedure was not followed in this case, and therefore the brief now advanced under the name of the ABA

cannot accurately speak for the members of that organization.

2. The Policy and Procedures Handbook of the ABA sets forth the requirements and procedure for a particular section, committee or other entity of the ABA to obtain authorization from the ABA Board of Governors to file brief amicus curiae (pp. 79ff.). The pertinent aspect of those requirements provides that the formal application to the Board of Governors for authorization must include:

1. A list of sections, divisions, or committees which may have any interest in the issue presented, and a statement that a copy has been sent to each. Failure to provide these entities with adequate notice may result in denial of the application. If possible, these entities should be consulted and their positions ascertained prior to the

submission of the application. The application shall discuss what has been done in this respect and the position, if any, of the other entities. (p. 82).

3. Here, the filing of an amicus curiae brief has been urged by the ABA's Section on Individual Rights and Responsibilities. This section is generally identified as being comprised of attorneys who represent plaintiffs in civil rights related matters. Counsel for Respondent was informed by co-counsel for the ABA as amicus curiae that during the week of June 6, 1988, the ABA Board of Governors "took a position" that the decision in Runyon v. McCrary should not be overruled, and that, subsequently, a formal application for authorization for the brief was filed with the Board of Governors. That

application was still pending at the time Respondent's consent was sought. 1/

4. Despite the above quoted rules, we are informed that the views of the ABA Section of Labor and Employment Law were not solicited in conjunction with the instant application for authorization to file a brief amicus curiae. (Respondent also believes that the views of other interested sections may not have been solicited.) The Section of Labor and Employment Law undeniably has an interest in this

1/Co-counsel for the ABA as amicus curiae, Mitchell F. Dolin, has subsequently asserted that the Board of Governors did not "act" until on or about June 15 or 16, 1988, the date of a telephone conversation with counsel for Respondent. Nevertheless, it appears that the application for authorization still was pending at that time.

case, since its members represent clients which are frequently defendants in suits brought under 42 U.S.C. §1981. Nevertheless, when counsel for Respondent requested a copy of the application which had been filed, in order to ascertain whether the ABA's procedures had been followed, the request was denied.

5. Because the authorization procedures of the ABA were not followed in that at least one interested entity of the ABA was not consulted with respect to the proposed brief amicus curiae, and because of the apparent haste in which authorization was sought, a serious question exists whether the position in the proposed brief truly reflects the views of the interested members.

6. A nationwide organization purporting to speak for the legal profession as a whole has a special duty to take care that procedures designed to assure adequate notice to interested members, an opportunity to be heard and a deliberate, reasoned decision on action proposed in the name of the ABA -- i.e., due process -- are followed in letter and spirit. This is particularly true in cases before the Supreme Court involving issues of significant public interest, where many members may feel that the ABA should take a contrary position, or perhaps, no position at all.

7. For the reasons stated herein, Respondent has withheld consent to the ABA's request to file a brief as amicus curiae, and now

opposes its motion for leave to do
so.

Respectfully submitted,

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No. 67-197

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

BRENDA PATTERSON,
v. *Petitioner,*
McLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM OF THE
AMERICAN BAR ASSOCIATION IN SUPPORT OF
ITS MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE SUPPORTING PETITIONER

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IN THE
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OCTOBER TERM, 1988

—
No. 87-197
—

BRENDA PATTERSON,
v. *Petitioner,*
MCLEAN CREDIT UNION,
Respondent.

—
On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit
—

REPLY MEMORANDUM OF THE
AMERICAN BAR ASSOCIATION IN SUPPORT OF
ITS MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE SUPPORTING PETITIONER
—

Respondent has filed an objection to the motion of the American Bar Association for leave to file its brief as amicus curiae in support of petitioner. The ground of respondent's objection is an assertion that the ABA did not follow its internal rules of procedure for the filing of amicus briefs. Respondent is in error. Moreover, the questions respondent has raised regarding internal ABA procedure are irrelevant to the standards provided for amicus participation under Rule 36 of the Rules of this Court.

The policy of the ABA is established by the House of Delegates or, when the House is not in session, by the Board of Governors. The House and the Board frequently

act on issues about which individual lawyers within the ABA have differences of opinion.

In this case, the Board of Governors, at its meeting in Denver, Colorado, on June 10, 1988, determined that the position of the ABA should be to oppose overruling *Knapp v. McCreary* and directed preparation of an amicus brief in support of that position. On June 13, a draft brief was circulated to all sections and divisions within the ABA. Thereafter, the draft brief was considered on June 17 by the ABA's Special Committee on Amicus Curiae Briefs, and, with that committee's recommendations before it, the Executive Committee of the Board of Governors reviewed the brief and on June 20 authorized its filing. The motion for leave to file and brief were submitted to the Court on June 24.

No action or decision of the ABA has opposed either the action taken by the Board of Governors on June 10 or the filing of the brief that was submitted by the President on behalf of the Association.

CONCLUSION

The American Bar Association urges that leave to file its proposed amicus brief be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether or not the interpretation of 42 U.S.C. §1981 adopted by this Court in Barnes v. McCrary, 437 U.S. 160 (1976), should be reconsidered.

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87-107

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRENDA PATTERSON,
Petitioner,

vs.

MCLEAN CREDIT UNION,
Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT ON REARGUMENT

CITATIONS TO OPINIONS AND JUDGMENTS BELOW,
JURISDICTION, AND STATUTE INVOLVED

Respondent has no objection to the
Petitioner's presentation of any of these mat-
ters.

STATEMENT OF THE CASE

The Court in BUNYON V. McCRAVE, 427 U.S. 160 (1976), held that "[42 U.S.C.] §1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are Negroes...." 427 U.S. at 168. More broadly, however, the Court determined that "§1981 ...reaches purely private acts of racial discrimination" in the making and enforcement of private contracts. *Id.*

Justice White, joined by Justice Rehnquist, dissented. In their view, the plain language of §1981, its legislative history, and clear dictum in the nearly contemporaneous Civil Rights Cases, 109 U.S. 3, 16-17 (1883), all inveighed against the majority's conclusion. 427 U.S. at 192-214. They saw no prohibition in §1981 "against a private individual's or institution's refusing

to enter into a contract with another person because of that person's race." *Id.* at 192.

Feeling bound by earlier decisions of the Court, two other Justices concurred in the majority decision,^{1/} but expressed varying degrees of skepticism with its construction of §1981. *Id.* at 186-189 (Powell, J., concurring), 189-192 (Stevens, J., concurring).^{2/}

The majority treated the result in Bunyon v. McCrave as virtually foreordained by

^{1/} The dissenters took issue with the concurring Justices' sense of fealty. *Id.* at 192 n.1 (Per White, J.).

^{2/} Justice Powell stated that he "might well be inclined to agree with Justice White that §1981 was not intended to restrict private contractual choices," observing that "Much of the [dissent's] review of the history and purpose of this statute...is quite persuasive." *Id.* at 186. Justice Stevens was even more emphatic: "There is no doubt in my mind that [the majority's] construction of the statute would have amazed the legislators who voted for it," he said. *Id.* at 189. "Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence. *Id.*

earlier cases. 427 U.S. at 168-169.^{1/} It began with the premise, articulated in Jones, 392 U.S. at 441-43 n. 78, that both §1981 and its companion, 42 U.S.C. §1982,^{2/} derived originally from §1 of the Civil Rights Act of 1866^{3/} 427 U.S. at 170. It recalled that in Jones, the Court held that the portion of the 1866 statute which was codified as §1982 prohibited private racial discrimination in the sale or rental of real or personal property. Id. This determination, it continued, was reaffirmed and broadened in Tillman, SWPRA. Id. at 171. There, relying on Jones,

^{1/} Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The majority agreed with the court of appeals in Runyon that the "conclusion that §1981 was ... violated follows inexorably from the language of the statute, as construed in Jones, Tillman, and Johnson." 427 U.S. at 173.

^{2/} See App. at 7.

^{3/} Act of April 9, 1866, ch. 31, §1, 14 Stat. 27. See App. at 1-3.

the Court held that a private swimming club had violated §§1981 and 1982 and the Civil Rights Act of 1964,^{4/} by enforcing a guest policy that discriminated against Negroes. It saw no reason to interpret §1981 and §1982 differently there in view of the "historical interrelationship" between the two provisions. 427 U.S. at 171.

Finally, in reviewing Johnson, 421 U.S. 454 (1975), the majority stated:

[T]he Court noted that §1981 "relates primarily to racial discrimination in the making and enforcement of contracts," 421 U.S., at 459, and held unequivocally "that §1981 affords a federal remedy against discrimination in private employment on the basis of race." Id., at 459-460.

427 U.S. at 172. The Court declared that from these precedents it was "apparent" that the respondent private schools in Runyon had en-

^{4/} 42 U.S.C. §2000a, et seq. (1981).

gaged in "a classic violation of §1981" by barring the black applicants. *Id.*

The dissent faulted the majority's analysis of the legislative history of §1981.^{10/} Whereas the principal opinion saw §1981 as a lineal descendant of §1 of the Civil Rights Act of 1866, as interpreted in *Jones*, the dissent concluded that §1981 (formerly §1977 of the Revised Statutes of 1874)^{11/} in fact was the literal reenactment of §16 of the Enforcement Act of 1870^{12/}, and was not rooted in the 1866 Civil Rights Act. 427 U.S. at 206-

^{10/}Unlike the dissent, the majority opinion in *Runyon* did not directly address whether the plain language of §1981 supported the results. Presumably, it found this task unnecessary in light of its reliance on past decisions. The dissent, of course, found no warrant for the Court's decision in the language of the Code. 427 U.S. at 193-195.

^{11/}Revised Statutes of the United States, 1873-'74 (U.S. Gov't. P.O., Washington D.C., 1875) at 384.

^{12/}Act of May 31, 1870, ch. 114, §16, 16 Stat. 140, 144.

211.^{10/} It laboriously traced the legislative history of §16 of the 1870 statute to show that §1981 "means what it says and no more", i.e. "that it outlaws any legal rule disabling any person from making or enforcing a contract but does not prohibit private racially motivated refusals to contract." *Id.* at 195. Having reached this conclusion, the dissent disputed the majority's assertion that a full examination of the meaning of §1981 was pretermitted by the three cases cited earlier.^{11/} 427 U.S. at 192 n.1, 213-214. *Jones*, it explained, was a decision construing §1982, which had a different source than §1981, and did not foreclose a determination

^{10/}The majority conceded that §1977 of the Revised Statutes (1874) was based, in part, on §16 of the 1870, but saw the latter as an interim measure in no way diminishing the right of action based on private acts of discrimination which, it believed, was created by §1 of the 1866 Civil Rights Act.

^{11/}*See. SUPRA.* at 4 n.3.

on the merits regarding §1981; the writ of certiorari in Johnson was limited to the issue of whether the timely filing of a Title VII ^{12/} charge with the Equal Employment Opportunity Commission tolls the running of the period of limitations for filing an action based on the same facts under §1981, and the Court's statement in Johnson that §1981 supplies a cause of action for a private racially motivated refusal to contract was dictum, made without briefs and without discussion; and Tillman held only that the respondent swimming club was not a private club under Title II of the Civil Rights Act of 1964, and not exempt as a private club from any cause of action based either on §1981 or §1982, should one exist. Id. Accordingly, the dissent in Runyon viewed §1981 as a fair subject for

^{12/}Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §2000a, et seq. (1981).

authoritative statutory construction by the Court.^{13/}

SUMMARY OF ARGUMENT

The Court's invitation to the parties to argue whether the decision in Runyon should be reconsidered entails a reexamination of the merits of its statutory construction. This, in turn, requires an inquiry into the intent of the Enforcement Act of 1870, as well as the 1874 enactment of §1977 of the Revised Statutes. Deriving as it does from the "State action" provisions of these laws, §1981 authorizes no cause of action for purely private acts of racial discrimination.

Moreover, even consideration of the 1866 Civil Rights Act does not alter this

^{13/}The concurring Justices accepted the majority's premise that §1977 of the Revised Statutes was based in part on the Civil Rights Act of 1866, but questioned or disputed the court's interpretation of that earlier enactment. 427 U.S. at 186 (Powell, J., concurring); id. at 189-190 (Stevens, J., concurring).

conclusion. This was recognized by the dissent in Runyon. From its history, it is plain that the Civil Rights Act of 1866 specifically intended to remove the legal disabilities imposed by state laws against black citizens. Laws governing their prior status as slaves had deprived these individuals of fundamental legal capacity in such matters as contracting. The Act was intended to nullify recently enacted state laws that sought to disable freedmen by again depriving them of their legal capacity. No cause of action was provided for private acts of discrimination.

Finally, we argue that concerns for *stare decisis* should not prevent the Court from overruling Runyon. Perpetuation of the Runyon rule would, indeed, breach the constitutional separation of powers. *Stare decisis*, requires flexibility, rather than rigid adherence. Here, the principal concern

of the doctrine may be preserved despite a decision to overrule Runyon.^{14/}

^{14/}For the reasons stated in our previous brief on the merits, as well as for those stated herein, Respondent submits that Petitioner cannot maintain an action pursuant to §1981. Accordingly, the result in this matter should remain the same, even if the Court decides to reconsider Runyon.

ARGUMENT

POINT I

SECTION 1981 AUTHORIZES NO CAUSE OF ACTION FOR PURELY PRIVATE ACTS OF RACIAL DISCRIMINATION SINCE IT DERIVES FROM "STATE ACTION" PROVISIONS OF SECTION 16 OF THE ENFORCEMENT ACT OF 1870 AND SECTION 1977 OF THE REVISED STATUTES.

Viewing §1981 as derived, in part, from the Civil Rights Act of 1866, the majority in Runyon saw no need to fully discuss the effects of the Enforcement Act of 1870 on the present statute. Justice White, joined by Justice Rehnquist, dissenting, believed that this intervening law gave §1981 a different provenance than the 1866 Civil Rights Act, even if Jones correctly interpreted the 1866 statute under §1982. The dissenting opinion, in our view, was correct.

A. The Dissent In Runyon Correctly Interpreted Section 1981 As Derived from Section 16 of the Enforcement Act.

Section 1981's language does not authorize a contractual servitude for racial reasons. Justice White correctly observed that by its plain language, §1981 cannot be read to impose anti-discrimination requirements on private decisions to deal. 427 U.S. at 193-196. As there described, nothing in the statute's wording can be read to confer superior rights on Negroes or other racial minorities requiring an unwilling private party to enter into a relationship with them. The section guarantees only that "[a]ll persons" shall have the "same right to make and enforce contracts ... as is enjoyed by white citizens." (Emphasis). Thus, the language of the statute points to

another meaning.^{15/} It suggests that §1981 is intended to remove any legal disabilities imposed on account of race, and confer legal capacity on the individual so that he may enter into enforceable contracts and enforce them in court, if necessary. *Id.* See Avins, The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property, 40 So. Cal. L. Rev. 274, 305-306 (1966) [hereinafter Avins, Civil Rights Act of 1866]. This conclusion is borne out by examination of the origin of §16 of the 1870 statute, which

^{15/}A correct interpretation of §1981 can be made by examining the statute on its face. Although the clause "to make and enforce contracts" does not necessarily point to a distinct construction, it is surrounded by other clauses all of which require some form of state action before judicial enforcement will occur. The maxim *noscitur a sociis* ("it is known by its associates") suggests that the clause "to make and enforce contracts" should also be interpreted to require some form of state action. An inquiry into the legislative history supports this conclusion. See also Polaroid Corp. v. Commissioner, 278 F.2d 148 (1st Cir. 1960), *aff'd sub nom. Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), and National Muffler Dealers Ass'n. Inc. v. United States, 440 U.S. 472 (1979).

Justice White correctly concluded is the true antecedent of §1981. 427 U.S. at 195 and n.6.

B. The Enforcement Act of 1870 Rendered Section 1 of the Civil Rights Act Largely Vestigial As To Contract Rights.

There can be no quarrel with the dissenting Justices' history of §16 of the 1870 Enforcement Act. It derived from the Fourteenth Amendment^{16/} and was designed to give to all persons within the jurisdiction of the United States, including Chinese and other aliens, the equal protection of the laws as against State abridgment. 427 U.S. at 195-206. See Bhandari v. First National Bank of Commerce, 829 F.2d 1343, 1345-1348 (5th Cir. 1987) (*en banc*), petition for cert. filed, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 87-1293); McClain, The Chinese Struggle for Civil Rights in Nineteenth Century America: The

^{16/}U.S. Const. Amend. XIV, §1, 2.

First Phase, 1850-1870, 72 Cal. L. Rev. 529, 565-568 (1986). It was not based on the Thirteenth Amendment, as was the 1866 Civil Rights Act. See Runyon, 427 U.S. at 202 (White, J. dissenting). Nevertheless, insofar as material here, §16 used language similar to that employed in Section 1 of the earlier law. It declared that aliens should:

have the same right in every State and territory in the United States to make and enforce contracts, to sue, be parties, [and] give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

Thus, the real question raised by the dissent in Runyon is over the fate of §1 of the Civil Rights Act of 1866. The legislative history of the 1870 Enforcement Act shows that Section 16 eclipsed it; and the passage of §1977 of the Revised Statutes of 1874 dispatched it. Thus, the question whether §1981 authorizes a cause of action for

purely private acts of discrimination must be decided in the negative.

1. Congress Viewed Both Acts Under The Lens Of The Fourteenth Amendment.

Section 18 of the 1870 Enforcement Act "reenacted" the Civil Rights Act of 1866.^{17/} However, in introducing S.365, ^{18/} which would ultimately result in §§16 and 18

^{17/} Section 18 of the Enforcement Act stated:

And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Act of May 31, 1870, ch. 114, §18, 16 Stat. 140, 144.

^{18/}-A Bill to secure to all persons the equal protection of the laws." S.365, 41st Cong., 2d Sess. (1874); brought in, read twice, referred to the Committee on the Judiciary, and ordered to be printed, January 10, 1870. See Cong. Globe, 41st Cong., 2d Sess., 1536 (February 24, 1870) (Sen. Stewart: "I move that the Senate proceed to the consideration of [S. 365] to secure to all persons equal protection of the laws." (emphasis added). (This was also the title of the bill.) S. 365 eventually became §§16-18 of the 1870 Enforcement Act.

of the 1870 legislation, Senator Stewart of Nevada, viewed the earlier statute through the equal protection clause of the Fourteenth Amendment.^{12/}

He explained:

The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws... This is all there is in the bill.

Cong. Globe, 41st Cong., 2d Sess. 1536
(February 24, 1870) (emphasis added).

Moreover, the object of §16, the "Chinese

^{12/}The Fourteenth Amendment was first proclaimed on July 20, 1868. On December 6, 1869, Senator Stewart introduced a resolution, which was unanimously approved, authorizing the Committee on the Judiciary to inquire, *inter alia*, whether the States were denying to any class of persons within their jurisdiction the equal protection of the law in violation of the Fourteenth Amendment. Cong. Globe, 41st Cong., 2d Sess. 3 (1869). However, by early 1870 no legislation had been passed. ¹⁴at 3489 (May 16, 1870) (Sen. Morton: "[N]ow nearly two years have passed away since that amendment became the law of the land and there is no law to enforce it." ¹⁴.)

bill," in equalizing the protection of laws accorded to "persons" (including aliens) with that accorded to "citizens" under the 1866 Act (except as to property), was made clear from a colloquy between Senator Stewart and Senator Pomeroy:

Mr. Pomeroy: I have not examined this bill, and desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the ~~same~~ civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?

Mr. Stewart: No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.

Mr. Pomeroy: That is what I was coming to.

Mr. Stewart: The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not

citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section.

Id. 19/

19/ Some time later, when Senator Stewart offered a slightly modified version of S.365 as part of Senator's Edmund's bill (S.810) to enforce the Fifteenth Amendment, Senator Stewart again focused on the "equal protection" needed by Chinese aliens for the legal capacities conferred on citizens by the 1866 Act:

Mr. Stewart: While [Chinese aliens] are here I say it is our duty to protect them. I have incorporated [S.365] in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhumane as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the

(continued...)

Thus, the applicable "provisions of the 1870 Enforcement Act spr[ang] from a different source than the 1866 statute -- a concern for the shameful treatment of alien Chinese in California." McClain, *supra*, at 529. Yet, because of the apparent similarities between the two provisions, §16 naturally would be seen as largely superseding §1 of the Civil Rights Act.^{20/}

19/ (...continued)

laws and the same laws that other men are. That is all there is in that provision." Id. at 3658 (May 24, 1870) (emphasis added).

Later, Sen. Stewart would emphasize, "[N]o state shall deny to any person, whether he is an alien or native-born citizen, the equal protection of the laws." Id. at 3808 (May 25, 1870). (emphasis added).

20/ Changes in the proposed wording of the Enforcement Act reveal the drafters' belief that §16 of the 1870 Enforcement Act would generally supplant the 1866 law as to those rights common to both. As originally drafted, Section 18 of the 1870 Act not only recited that the 1866 Act was reenacted, but it also stated, "and said Act, except the first and second sections thereof, is hereby referred to and made a part of this Act." Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (emphasis added). Later, however, this

(continued...)

2. The Reasons for the Reenactment of the Civil Rights Act in Section 18 Support The Derivation of Section 16.

Since Congress was uncertain of its authority to enact the Civil Rights Act under the Thirteenth Amendment, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 651 (1979) (White, J., concurring); Mahone v. Waddle, 564 F.2d 1018, 1037 n.1 (1977) (Garth, J., dissenting), action under the Fourteenth Amendment was necessary to assure that the property rights protection ("to inherit, purchase, lease, sell, hold, and convey real and personal property....") accorded citizens,

^{20/}(...continued)

underscoring provision was dropped in favor of the phraseology adopted in §18: "and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act." Act of May 31, 1870, ch. 114, §18, 16 Stat. 140, 144. Thus, even if the original proposal suggested a specific intention to reenact §§1 and 2 of the 1866 Act and maintain them independently of the analogous provisions of the 1870 Act (i.e. §§16 and 17), that articulation was abandoned in favor of a general wording more consistent with the views of Senator Stewart.

but not aliens, under the 1866 statute would continue. This protection had purposely been omitted from §16 of the 1870 Act.^{21/}

^{21/}Senator Stewart answered a fellow Senator's inquiry, as follows:

Mr. Pomeroy: Does the property of a foreigner here descend under our laws? Most of the States appoint a public administrator who administers upon the estates of foreigners differently from what he does on the estates of citizens. Does [S. 365] interfere with that?

Mr. Stewart: I think not.

* * *

Mr. Stewart: [S. 365] has nothing to do with property or descent. We left that part out of the law.

Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

The omission as to real property accords with prevailing jurisprudence under Article IV, Sec. 2 of the Constitution, that only citizens had the right to own real property. The omission of rights respecting personal property from §16 is probably explained by the fact that it was not a part of "protection of the laws" at the time. Avins, Civil Rights Act of 1866, *supra*, at 304.

Congress also sought to use the enforcement machinery of the 1866 Act in connection with §16 and other, voting rights provisions of the Enforcement Act. Section 18 effected this purpose.^{22/}

C. Section 1977 of the Revised Statutes Was A Modified Reenactment of Section 16.

The language and history of §1977 of the Revised Statutes of 1874 (the former designation of §1981) show that it derives only from §16 of the 1870 Act. Since Section 16 is indisputably a Fourteenth Amendment statute requiring state action, and §5596 of the Revised Statutes repealed §18 of the 1870 Act, §1981 cannot be invoked against purely private acts of racial discrimination.

The language of §1977 is drawn verbatim from the first portion of §16 of the 1870 Act, as was demonstrated in Justice

^{22/}Cong. Globe, 41st Cong., 2d Sess. 3560-3561 (May 18, 1870) (Senator Stewart).

White's dissenting opinion in Runyon, 427 U.S. at 195 n.6.

The headnote notation which appears in the margin next to §1977 of the Revised Statutes confirms its origin.^{23/} The notation reads:

Equal rights under the law.
31 May, 1870, c. 114, s.
16, v. 16, p. 144.

^{23/}As noted by Justice White:

The title of 1981 was placed there originally by the Revisers who compiled the Revised Statutes of 1874. They did so under a statute defining their responsibilities in part, as follows: to "arrange the [statutes] under titles, chapters, and sections, or other subtitle divisions with head notes briefly expressive of the matter contained in such divisions." 14 Stat. 75. (Emphasis added). The headnote to what is now §1981 was before Congress when it enacted the Revised Statutes into positive law. It may properly be considered as an aid to construction, if the statutory language is deemed unclear. [Citations omitted].

The history of the Revised Statutes makes clear that this final notation accurately reflected the intention of Congress in enacting the current statute.

1. The 1872 Report of the Commissioners for Revision of the Statutes Indicates That §1977 Was Derived Only From §16.

As early as 1843, Congress expressed a desire to revise the Statutes at Large, which by then had become nine volumes of unindexed and unorganized laws.^{24/} Under the Act of June 27, 1866, 14 Stat. 74, as reenacted by the Act of May 4, 1870, c. 72, 16 Stat. 96, Congress empowered three Commissioners to revise the Statutes at Large and to

make headnotes and marginal notes providing guidance as to the origin, breadth, and judicial interpretation of the revised sections. *Id.*

[T]he Commissioners [were] to bring together all statutes and parts of statutes which, from similarity of subjects, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text. §2, 14 Stat. 75. (emphasis added).

Under §3, 14 Stat. 75, the Commissioners were to "suggest to Congress such contradictions, omissions and imperfections as may appear in the original text." *Id.*, §3. They also had that option of designating such statutes for repeal. *Id.*

The future §1977 emerged from these endeavors with the following headnote and marginal notations:

^{24/}For a more complete discussion, see Dawn and Feidler, The Federal Statutes - Their History and Use, 22 Minn. L. Rev. 1008 (1938); Burdick, The Revision of the Federal Statutes, 11 A.B.A.J. 187 (1925); 1 Superintendent of Documents, Checklist of United States Public Documents 1789-1909, (3d ed. 1911) at 968-970, 1524-1525; Blodgett, The Revised Statutes of the United States. Read Before the Social Science Association of Philadelphia, Dec. 16, 1875 as reprinted from the Penn Monthly, January 1876.

Equal rights under the law.

31 May, 1870, c. 114, s.16,
v. 16, p.144

1 Abb. U.S. 28, 84, 338.^{25/}

The headnote and marginal note, except for the case citations, would appear next to §1977 of the Revised Statutes.

The majority in Runyon mistakenly relies on the absence of such a designation in the Commissioner's Report^{26/} to show that the failure to cite the Civil Rights Act of 1866 occurred "either inadvertently or on the assumption that the relevant language of §1 of the 1866 Act was superfluous." 427 U.S. at 167 n.8.

^{25/}Revision of the United States Statutes as Drafted by the Commissioners Appointed for That Purpose, v.1, p. 85 (1872) (Library of Congress No. "KF 50.U5").

^{26/}Id. at Title XXVI §§8, 24.

First, under §2, 14 Stat. 75, the Commissioners were to make alterations only if they found contradictions, omissions or imperfections in the original text. There was no such problem with §16 of the 1870 Act. Therefore, there was no reason to promise an explanation.

Second, the majority in Runyon suggests the Commissioners omitted §1 of the 1866 Act because it was "superfluous." That may be; or, they may have viewed the 1866 Act as obsolete insofar as §16 offered apparently similar coverage. In either case, their mandate allowed it. More importantly, it shows an intention to eliminate §1 as a source of the Revised Statutes.

A valuable insight into the thinking of the commissioners comes from Benjamin Vaughan Abbott, one of the three Commissioners who submitted the 1872 Report.

In quoting the text of §1 of the Civil Rights Act of 1866 in his National Digest, Abbott italicized certain words, but not others. He explained:

The words italicized are embodied in Rev. Stat. Section 1978; the other portions of this section have been superseded, either by later enactments which have been embodied in other sections of the Revision (see tit. XXIV.) or by the 14th amendment of the Constitution.

1 Abbott's National Digest at 639 n.1 (1884) (emphasis added). Title XXIV contained the provisions on Civil Rights, including §1977. Thus, the sole citation of §16 of 1870 Act may be explained by the Commissioners' perception that the "later enactment" of §16 superseded § 1 of the 1866 Act.

2. The Further Revisions of Thomas J. Durant Maintained The "Equal Protection" Headnote of Future §1977.

After the Commissioners submitted their report in 1872, Congress realized that the Commissioners may have engaged in

legislation. Thus, Congress stated in an Act of March 3, 1873^{27/} that its receipt of the report should not "be construed as an approval or adoption by Congress of any part of the work of the Commissioners." Under authority of this Act, Congress hired Thomas Jefferson Durant to correct the Commissioners' excesses and issue a report in the form of a bill. H.R. 1215, 43rd Cong., 1st Sess. (1874).^{28/}

Durant's report contained no marginal notations,^{29/} for none were required under his mandate. Section 1977 only bore the headnote, "Equal rights under the law."^{30/} Durant's accompanying report did not criticize

^{27/} 17 Stat. 579, ch. 241.

^{28/} See Durant, Report on Revision of Laws (13 pp. - untitled) (1873), L'library of Cong., LL Rare Book coll.

^{29/} Unmarked Copy of T.J. Durant's Revision. Reported Dec. 1873. Library of Cong., LL Rare Book Coll. [hereinafter Durant's Revision].

^{30/} Id.

the Commissioners' Report^{11/} with respect to the future §1977.^{12/}

Congressional Joint Committee members, as well as others, then canvassed Durant's report for errors.^{11/} The future §1977 was left untouched. In December 1873, Durant's report, absent marginal notations, but with headnotes, went before Congress.^{14/} The headnote for §1977 (Title XXIV) was "Equal rights under the law."^{15/}

^{11/}Durant, Report on Revision of Laws.

^{12/}Durant's Revision, Article XXIV, §1982.

^{13/}Blodgett, *supra*, at 11-13; E.g., New York Chamber of Commerce, Title No. 8. Revision of the Commissioners' Draft (1873).

^{14/}2 Cong. Rec. (H) 810 (Jan. 21, 1874) and (H) 1210 (Feb. 4, 1874).

^{15/}*Id.* at 650 (Rep. Lawrence).

3. Representative Lawrence's Explanation of the Revision Supports the Commissioners' Interpretation of §1977.

Representative Lawrence, a member of the Joint Committee on the Revision of the Laws, used the 1866 and 1870 civil rights laws to illustrate how the revisers operated.^{16/} Lawrence explained that:

In the reported draught of the commissioners, as in Durant's revision, act of May 31, 1870, is very properly not treated as a revision of the whole subject, and hence as superceding the entire original act. The commissioners ... and Mr. Durant ... translate the sections ... from the acts of 1866 and 1870, so far as they relate to a declaration of existing rights, and confer a right of civil action for their violation as follows:

Equal rights
under the law.

SECTION 1. All persons within
the jurisdiction of the United

^{16/}2 Cong. Rec. 819-829 (1874). Copies of Durant's revision had been printed and distributed to Members of the House of Representatives. Representative Lawrence apparently had a copy of the Commissioners' draft in his possession, but it does not appear that copies were given to the Members during the debates.
Id.

31 May, 1870,
ch. 144, §16,
vol. 16, p.
144.

1 Abb. U.S. 28,
84, 388.

States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rights of
citizens in
respect to real
and personal
property

9 April, 1866,
ch. 31, §1, vol.
14, p. 27.

SEC.2. All citizens of the United States shall have the same rights, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil action for
deprivation of
rights.

20 April, 1871,
ch. 31, §1, vol.
14, p. 27.

SEC.3. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

2 Cong. Rec. 828.^{12/} After noting that the second sentence of §16 of the 1870 Act (referring to the taxation of immigrants) was retained in Durant's version elsewhere in his volume, Rep. Lawrence then remarked:

A comparison of all these could present a fair specimen of the manner in which the work has been done, and from these all can judge

^{12/} Before Congress passed 18 Stat. (Pt. III) 113, on May 20, 1874, Rep. Lawrence explained, "[M]arginal references are all omitted in Durant's revision... When the [Revised Statutes] shall be adopted by Congress, provision can be made for adding in its publication the marginal references and footnotes suggested." 2 Cong. Rec. 827 (January 21, 1874).

of the accuracy of the translation.^{38/}

There was no further discussion of these provisions on the record. The bill enacting the Revised Statutes was passed by the House, Id. at (H) 2713-2714, and by the Senate after only cursory discussion. Id. at (S) 4284-4286.

^{38/} 2 Cong. Rec. 828. Rep. Lawrence said earlier in his remarks, that following the adoption of the Fourteenth Amendment, §§16 and 17 of the 1870 Act reenacted "in modified words the substance of the original civil-rights sections." Id. at 827. Lawrence's remarks during the debates over the 1866 Civil Rights bill show that he viewed the original provisions as directed against state-imposed disabilities and actions taken under color of law. Cong. Globe, 39th Cong., 1st Sess. 1832-1836 (1866). See, infra, at 82-83. Thus, his reference to this "reenactment" does not signify that the 1870 reenactment of the Civil Rights Act reached purely private conduct. Also, he made no effort to reconcile this explanation with the reenactment of the 1866 Act in Section 18.

4. The Secretary of State's Addition of Marginal Notations Further Supports The "State Action" Interpretation of 1977.

Shortly before the Revised Statutes were approved by President Grant,^{39/} Congress authorized the Secretary of State to complete the headnotes and marginal notations and thereafter to cause the publication of the Revised Statutes.^{40/} Under this bill, the

^{39/} See 2 Cong. Rec. 3388 (June 22, 1874).

^{40/} 18 Stat. (Pt. III) 113, 43rd Cong., 1st Sess., ch. 333, §2 (1874), provided:

That the Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution the revised statutes of the United States enacted at this present session of Congress; that he shall cause to be completed the head notes of the several letters and chapters and the marginal notes referring to the statutes from which each section was compiled and repealed by said revision; and references to the decisions of the courts of the United States explaining or expanding the same, and such decisions of State courts as he may deem expedient, with a full and complete index to the same. And when the same shall be

(continued...)

published volumes were to be "legal evidence of the laws and treaties therein contained." 18 Stat. (Pt. III) 113. It is evident Congress intended that the notation next to §1977 should be relied upon as describing the sources of the statute. In any case, the headnote, "Equal rights under the laws,"

40/ (...continued)

completed, the said Secretary shall duly certify the same under the seal of the United States, and when printed and promulgated as hereinafter provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories. (emphasis added).

Of course, in enacting the Revised Statutes, Congress included §3396 which provided:

All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in many sections of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof....

remained,^{41/} and when, on February 22, 1875, Secretary of State Hamilton Fish certified the Revised Statutes, the only marginal notation was that relied on by Justice White. Revised Statutes of the United States, Washington, G.P.O. (1875) (National Archives - Diplomatic Branch).

It is clear from this exposition that no right of action to remedy purely private acts of discrimination can be inferred from the passage of §1977 of the Revised Statutes. The 1870 Act was not treated "as a revision of the whole subject" because the reference to property rights in the 1866 Act was now specifically treated in §1978.

^{41/} The engrossed Act, dated June 22, 1874 bearing the autograph signature of James G. Blaine, Speaker of the House, Matthew H. Carpenter, President of the Senate, and President Grant, also contains headnotes, but no marginal notations. This copy also bears the stamp of the Secretary of State, signifying he had received the engrossed act and would prepare it for printing. 2 Cong. Rec. 5388 (1874). The engrossed Act is currently deposited in the National Archives.

Representative Lawrence's remarks do not imply a continued vitality for §1 of the Civil Rights Act authorizing suit for acts unrelated to official conduct or laws. By including in the record the future §1979, which was derived from Section 1 of the Ku Klux Klan Act of 1871^{42/} and contained a "color of law" requirement for a civil action, Rep. Lawrence made plain that the redress contemplated for violation of §§1977 and 1978 was to have a state action component. This would be consistent with the views expressed by Senator Stewart in 1870 emphasizing a Fourteenth Amendment objective for §16.

But there is more. The civil rights enactments of April 9, 1866, May 31, 1870 and April 20, 1871, also contained criminal

^{42/}Act of April 20, 1871, ch. 22, §1, 17 Stat. 13.

sanctions.^{43/} In Mr. Durant's draft, Rep. Lawrence pointed out, the three provisions, each worded differently and possibly covering different crimes, were combined into one provision (§5577) made applicable to violations of rights in each of the three acts. 2 Cong. Rec. 828 (Jan. 21, 1874). The Revisers also had translated the provision of the three statutes into one Section, employing different language. Rep. Lawrence criticized the Reviser's source note as being inadequate:

Their marginal reference is only to act of "31 May 1870, ch. 114, sec. 17, vol 16, p. 144" and certainly is not sufficiently comprehensive to include all covered by the first section of the "Ku Klux Act" of April 20, 1871, and the omission is not elsewhere supplied in the published volumes of their revisions.

Id.

^{43/}These were, respectively, §2 of the Act of April 9, 1866, §17 of the Act of May 31, 1870, and §1 of the Act of April 20, 1871.

Rep. Lawrence made no such criticism of the marginal reference beside the text of future §1977. Specifically, he did not complain that no reference was made to the 1866 Act. Clearly, he saw §16 as the sole source in the Revised Statutes.

D. Petitioner's Argument That §1981 Authorizes Suits For Private Discrimination By Incorporating Section 1 of the Civil Rights Acts Is Unpersuasive.

Petitioner nevertheless contends that Justice White erroneously relied on the volume of the Revised Statutes published after the 1874 enactment, and that the marginal notes in an earlier draft prepared by the Revisers, which were before Congress when it enacted the revision into positive law, contain citations to cases allegedly showing that §1977 derived from §1 of the 1866 Civil Rights Act as well as §16 of the Enforcement Act of 1870. (Pet. Br. at 9). This argument lacks merit.

1. Petitioner's Arguments Are Irrelevant.

None of this criticism gainsays Justice White's points that (a) the language of §1977 is drawn from §16 rather than §1, and (b) that the headnote of §1977, "Equal rights under the law.", prepared pursuant to the statutory directive, is plainly descriptive of an equal protection object. 427 U.S. at 193 n. 3, 197 n.6.

Further, whatever draft may have been before it in 1874, Congress clearly authorized the "printed volumes" of the Revised Statutes to include marginal notes prepared at the direction of the Secretary of State. When published, the marginal notes read exactly as Justice White described. In any event, Petitioner's reliance on the missing citations is misplaced.

2. Despite Petitioner's Contention, The Citations in the Commissioners' 1872 Report Imply A State Action Requirement Consistent with §16.

Contrary to Petitioner's contentions, the citations to the decisions in United States v. Rhodes, 27 F. Cas. 785, 1 Abb. U.S. 28 (C.C.D. Ky. 1866) (No. 16, 151), and In re Turner, 24 F. Cas. 337, 1 Abb. U.S. 84 (C.C.D. Md. 1867) (No. 12, 247), contained in the Revisers' marginal notes next to the proposed §1977, do not lead to a conclusion that the section is derived from the 1866 Civil Rights Act and was intended to permit suits for purely private acts of discrimination. (Pet. Br. at 5-7).^{44/} The citations to these cases

^{44/} Rhodes involved the prosecution of a white man for burglary of the home of a black citizen. Under the laws of Kentucky, the victim was prohibited from testifying in court against the accused, because of her color. The Court (per Swayne, C.J.) held that removal to federal court was appropriate under §3 of the Civil Rights Act of 1866. 27 F.Cas. at 787, 789, 794.

(continued...)

in the Revisers' 1872 draft do not show that §1981 was intended to authorize suits for private acts of racial discrimination as a legacy of the 1866 Act, or that Congress so perceived it. Indeed, Rhodes illustrated that "the court took jurisdiction on the ground that the statute of Kentucky discriminated against colored citizens." 2 Cong. Rec. (H)413 (Jan. 6, 1874) (Rep. Lawrence) (emphasis added), whereas Turner was "[t]he case of the

^{44/}(...continued)

In Turner, a habeas corpus proceeding, Maryland had adopted a new Constitution abolishing slavery, effective November 1, 1864. The petitioner, a youth, who had been a slave of the respondent, and others were collected together under local authority and were bound as apprentices to their former masters. The terms of petitioner's indenture which was "claimed to have been executed under the laws of Maryland relating to Black apprentices," did not provide for education and permitted petitioner to be assigned and transferred at the master's will to any person in the county. 24 F. Cas. at 339. The Court (per Chase, C.J.), found that the arrangement was an involuntary servitude barred by the Thirteenth Amendment and violated the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, as provided by the 1866 Act." Id. The petitioner was ordered discharged. Id. at 340.

apprentice slave, held under the law of Maryland, liberated by Chief Justice Chase on a writ of habeas corpus under [the Thirteenth Amendment]..." Slaughter House Cases, 83 U.S. (16 Wall.) 36, 69 (1873) (emphasis added).^{41/} Accordingly, they are consistent with a view that deprivations under color of law and disabling state statutes were the target of §1977.^{42/}

^{41/}The petition in Turner was filed on September 20, 1867. 24 Fed. Cas. at 338. By Act of February 3, 1867, 14 Stat. 383, Federal courts were given authority to grant writs of habeas corpus for persons held under state authority "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States...." It appears that the writ in Turner was issued under this statute. Id. at 340. Cf. Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (the power to issue the writ by any United States court "must be given by written law") (per Marshall, C.J.).

^{42/}Petitioner does not mention the third case cited by the Revisers, The Live Stock, etc. Ass'n v. The Crescent City, etc. Co., 1 Abb. U.S. 388 (C.C.D. La. 1870) (later known as The Slaughter House Cases, 83 U.S. 36 (1873) at the Supreme Court level). Like Turner and Rhodes, this case involved state action, i.e., a statute creating a slaughter house monopoly in New Orleans.

In sum, §1977 of Revised Statutes, the present §1981, was based upon §16 of the 1870 Enforcement Act, which required state action. Section 16 was seen to supercede §1 of the 1866 Act as to those matters covered by both.

In fact, however, the 1866 statute never did authorize suits for private acts of discrimination.

We consider this next.

POINT II

THE CIVIL RIGHTS ACT OF 1866 WAS INTRODUCED TO REMOVE THE LEGAL DISABILITIES IMPOSED BY STATE LAW AGAINST BLACK CITIZENS

A. The Theory That The Civil Rights Act of 1866 Was Intended To Reach Private Action Is Inconsistent With The Political Dynamics Of The Early Reconstruction Era.

The passage of a federal statute that prohibited private racial discrimination would have been improbable under the political conditions that existed in 1866. Admittedly, the dominant Republican party was concerned with the condition of the freed slaves in the Southern states. The Civil Rights Act, however, applied to both Northern and Southern states. Given this nationwide applicability, other factors limited the scope of federal legislation that Republicans were willing to consider.

One of the most important of these factors was a widely shared desire to limit the role of the federal government in everyday

life. Although rejecting the Confederate theory of state sovereignty, most Republicans nonetheless believed that Congress should leave the regulation of most affairs to the states.^{42/} Condemnations of the idea of centralization reverberated through the Reconstruction debate. The views of Republican Representative Thomas T. Davis of New York -- later a supporter of the Civil Rights Act in its final form -- are typical:

[T]he distinguishing feature in our Government is this: the Federal Government has its peculiar and restrictive duties. It is a government of limited power and authority, extending over the whole country...but within that jurisdiction are erected many different States bound to allegiance to the Federal Government in all matters pertaining to the Union, yet in respect of social arrangement, in respect of the rights of property and control of persons, are entirely independent. And it is this feature which has given greater security and greater liberty to this country than

^{42/}Melts, Reconstruction Without Revolution: Republican Civil Rights Theory In The Era of the Fourteenth Amendment, 24 Houston L. Rev. 221, 232-236 (1987) [hereinafter Melts, Reconstruction].

was ever conferred before by any system of government which human wisdom has devised.

Cong. Globe, 39th Cong., 1st Sess. 1083 (1866). Influential Republican Senator James W. Grimes of Iowa expressed similar sentiments:

During the prevalence of the [Civil War] we drew to ourselves here as the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country. That time, it seems to me, has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves.

Id. at 2446 (1866). See also, e.g., HARPER'S Weekly, November 10, 1866 at 706; Open Letter from Carl Schurz to William Fessenden, Cincinnati Commercial, May 18, 1866, p. 2; Springfield Republican, April 5, 1866, p. 4; H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution, 300-301, 393-396 (1973).

If the Civil Rights Act had been intended to regulate purely private activity, it would have been totally inconsistent with this philosophy. The Bill would not only have effected a truly revolutionary change in the federal system but would also have been entirely inconsistent with the very natural rights theory which the Republicans sought to implement. Malts, Reconstruction, SUPRA, at 262.^{48/} Implicit in the concept that parties should be free to contract and to have the courts enforce voluntarily concluded agreements, is that the parties are free to refuse to enter into contracts. 427 U.S. at 193-195 (White, J., dissenting). To infer an intention to interfere with private decision-

^{48/}The Civil Rights Act was intended to guarantee certain limited rights to all citizens. These derived from the "natural" rights suggested by the Court in Corfield v. Coryell, 6 F. Cas. 346 (C.C.E.D. Pa. 1823) (No. 3, 230), cited by Sen. Trumbull in the debates. Cong. Globe, 39th Cong., 1st Sess. 474-475 (Jan. 29, 1866).

making generally would be inconsistent with basic Republican political theory. Maltz, Reconstruction, supra, at 262.

In essence, the decision in Runyon would have had an early Reconstruction Era Congress applying federally-created standards to every private transaction which involves nonwhite parties. These standards would have been applicable in the Northern states as well as the vanquished Southern states. Such an interpretation is hardly consistent with the expressed Republican commitment to the concept of a limited federal government.

Further, the very idea of a general prohibition on racial discrimination in private transactions was entirely foreign to the American political system when the Civil Rights Act was being considered. No state, no matter how strongly Republican, had adopted such a statute in 1866. Also, while Congress had abolished legally-created distinctions

based on race in the District of Columbia, a jurisdiction in which issues of federalism were not important,^{49/} the federal government had not seriously considered prohibiting private discrimination in the District. Thus, a general prohibition on private racial discrimination would have been an entirely novel legal concept in 1866.^{50/}

^{49/} See M.L. Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction 1863-1869 145-146 (1974).

^{50/} Some efforts had been made to eliminate racial discrimination in public accommodations--particularly common carriers. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 474 (1968) (Warlan, J., dissenting); Maltz, 'Separate But Equal' and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 Rut. L.J. 553 (1986). State authority over such facilities was based on the theory that operators of railroads, inns and the like were viewed as occupying "a sort of public office," with "public duties to perform." New Jersey Steam Navigation Co. v. Merchants Bank, 47 U.S. (6 How.) 344, 382-383 (1848). See also Derry v. Lowry, 6 Phila. Rep. 30, 31 (Common Pleas 1865); Maltz, supra, at 566-567. Thus prohibitions on racial discrimination in public accommodations provide little authority for similar restrictions on private action generally. Brief Amicus Curiae of Eric Foner, et al., at 21 nn. 17 and 18 erroneously relies on such cases to support their (continued...)

Such a prohibition would have been considered an extremely radical action to say the least. Yet the Civil Rights Act was generally considered a moderate Reconstruction measure. M.L. Benedict, supra, at 148-149, 164-165.

The Act was drafted by Senator Lyman Trumbull of Illinois, one of the more conservative mainstream Republicans in the 39th Congress. Id. at 149 n.93. Further, it was supported by a broad coalition of Republicans, including men such as Representative Davis and Senator William M. Stewart, both of whom opposed early attempts to explicitly arm Congress with the power to

10/ (...continued)

contrary and equally erroneous conclusion that §1981 should apply to private conduct. See Avins, The Civil Rights Act of 1875: Some Reflected Light On the Fourteenth Amendment and Public Accommodations, 66 Col. L. Rev. 873 (1966), and Avins, The Civil Rights Act of 1875 and "The Civil Rights Cases" Revisited: State Action, the Fourteenth Amendment, and Housing, 14 U.C.L.A. L. Rev. 9 (1966).

reach private activity. See Cong. Globe, 39th Cong., 1st Sess. 1083-1087 (1866) (Davis); Id. at 1082 (Stewart). None of these influential legislators would have been likely to endorse a radical statute.

In short, even if there were no direct evidence on the point, the political dynamic that generated the Civil Rights Act of 1866 renders the RUNYON interpretation implausible.

The case against applying section 1981 to private activity need not be based solely on inference and circumstantial evidence. During the course of the debate over the Civil Rights Act, supporters consistently and explicitly denied any intention to regulate private activity.

The debate in Congress and journalistic commentary show that Republicans adopted a moderate position which called for an intrusion of federal power only part of the way into the civil rights field. Republican lawmakers intended to redress and place restrictions upon state actions in relation to Negroes, not supersede

state power over private actions that violated blacks' rights. Subject to the conditions in the civil rights bill, which were designed to prevent the kind of flagrant discrimination passing beyond mere diversity that the black codes represented, states would remain the principal centers of republican government. The bill thus embodied a theory of state action as a limitation on federal power.

Bels, A New Birth of Freedom. The Republican Party and Freedmen's Rights, 1861-1866 166 (1976).

As we discuss below, the Civil Rights Act of 1866 itself was a statute of limited scope. Its proponents did not envisage that it would be applied to remedy acts of purely private discrimination. Rather, they intended to protect United States citizens by assuring that they would not be deprived of essential rights through disabling legislation or adverse enforcement efforts. To better appreciate the context in which the Act arose, it is important to review the pre-Civil War laws which deprived the enslaved

Negro of his most fundamental civil rights, for they show the evil which the Civil Rights Act sought to remedy.

B. Ante-Bellum Laws Deprived Slaves of Fundamental Legal Capacity.

The laws which disabled slaves before 1865 left them bereft of elemental rights accorded citizens throughout the country. "A slave ... has no civil rights or privileges. He is incapable of making or discharging a contract ...," stated Justice Story. Emerson v. Howland, 8 F. Cas. 634 (C.C.D Mass. 1816) (No.4,441). Similarly, in Jenkins v. Brown, 25 Tenn. 299 (1845), the court wrote:

It is unquestionably true, that a slave has no right to acquire and hold property or money; that he and every thing of his earnings belongs to his master; and that he can make no contract which is obligatory upon himself, or the person contracted with.

Id. at 302 (emphasis added). Another court, in Bailey v. Poindexter's Executor, 14 Va. (55

Gratt) 132 (1858), quoting 2 Kent, Commentaries 253, similarly observed:

[Slaves] cannot take property by descent or purchase, and all they find and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights.

Id. at 190 (emphasis added).

As one commentator has concluded:

In contrast with the rights of citizens of the United States, a slave did not have the capacity to make a contract on his own account... and an executory contract with a slave acting on his own account was void... even with his own master.^{31/}

Continuing, the author notes:

Nor could a slave who made any promise in writing be sued thereon, even after he became free... and even if the promissory note sued on was the inducement for his own emancipation.... Conversely, a promissory note given to a slave for money was void and could not support an action.... As the Supreme Court of Alabama remarked: "The status of a slave, under our laws, is one of entire abnegation of civil capacity He has no authority to own anything of value.

^{31/}Avins, The Civil Rights Act of 1866, supra, at 280 (citations omitted).

nor can he convey a valuable thing to another."^{32/}

Moreover, prohibitions against buying from, selling to, or borrowing money from a slave were enforced by criminal statutes, to further suppress any spirit of personal freedom in slaves.^{33/} Slaves, then, were "utterly disabled." Fable v. Brown, 11 S.C. Eq. (2 Hill Eq.) 378, 391-92 (1835).

It was against this background that Congress enacted the Civil Rights Act of 1866.

C. The Civil Rights Act of 1866 Nullified State Laws Disabling Freedmen and Granted Essential Legal Capacity. But Did Not Include A Cause Of Action For Private Acts Of Discrimination.

1. The Statute

Section 1 of the Civil Rights Act of 1866 guaranteed to all United States citizens

^{32/}Id. at 281 (emphasis added; citations omitted). The slave's earnings as well as other property belonged to the master. Id. at 282.

^{33/}Id. at 283-84.

"the same right" as was enjoyed by white citizens to make and enforce contracts and exercise other specified rights. As Justice White concluded in Burns, with respect to §1981:

The state by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances; and it consequently fails to supply a cause of action by respondent students against petitioner schools based on the latter's racially motivated decision not to contract with them.

427 U.S. at 194-195 (footnote omitted) (dissenting opinion). Further, §2 of the 1866 Act, containing penal provisions, by its terms only applied to actions taken under "color of law." Finally, as Judge Garth has demonstrated at considerable length in Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), Section 3 of that Act did not "confer upon the federal courts original jurisdiction to entertain private claims under that Act." *Id.*

at 1044, 1045-1049 (dissenting opinion). It is strange, indeed, that Congress would have created a right to sue for private acts of racial discrimination in a statute specifically recognizing the short comings of state court proceedings without providing a federal forum in which to bring those claims. Yet, as Judge Garth concludes, it was not until 1871, with the passage of the Ku Klux Klan Act that a federal remedy would have been provided for §1 violations. *Id.* at 1038-1044.^{24/} And then, the remedy was limited to deprivations "under color of any law, ordinance, regulation, custom or usage...." *Id.* at 1041, citing Rev. Stat. §§564 (12), 629

^{24/} See also Sen. Lawrence's comments on the relationship between the current §§1981, 1982 and 1983, supra, at 33-35.

(16).^{21/}

2. The Civil Rights Act of 1866

a. The Debates in the Senate

According to Senator Lyman Trumbull, the Chairman of the Senate Judiciary Committee and Sponsor of the bill^{24/}, S.61 (the eventual Civil Rights Act of 1866) was intended to secure the inherent rights of freemen, as authorized under the Thirteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). The principal obstacle to attaining this goal, he said, were the black codes:

And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slave holding States laws are to be

^{21/}cf. 42 U.S.C. §1343(3) and §1983, the latter being derived from Rev. Stat §1979, which also originated in §1 of the Klu Klux Klan Act. Id. at 1037-1038 n.1.

^{24/}"It is the sponsor that we look to when the meaning of the statute is in doubt." Schwartzman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)

enacted and enforced depriving persons of African descent of privileges which are essential to freemen

Id. After addressing some of the abuses found under the recent laws of Mississippi and South Carolina, Senator Trumbull continued:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

Id.^{22/} See also id. at 588-89 (Feb. 1, 1866)

^{22/}This theme was not new to Senator Trumbull. On December 13, 1865, addressing a bill (S.9) introduced by Sen. Wilson (Mass.), an early civil rights measure which failed, Trumbull said:

The second clause of [the thirteenth] amendment was inserted for some purpose, and I would like to know of the Senator

(continued...)

²²/(...continued)

from Delaware for what purpose? Sir, for the purpose and none other, of preventing State Legislatures from enacting, under any pretense, those whom the first clause declared to be free. It was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect.

¹⁴. at 43 (emphasis added).

Similarly, in connection with the Freedmen's Bureau Bill (S.40), a companion measure to the Civil Rights Act which would pass in Congress, but meet its demise in a Presidential veto, Trumbull repeatedly viewed the black codes as badges and incidents of slavery, abolished by the Thirteenth Amendment. ¹⁴. at 322 (Jan. 19, 1866). He also made clear that the annulment of these laws was the common object of the Civil Rights Act:

If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he please, it has the power to do so, and not only the power, but it becomes its duty to do. That is what is provided to be done by this bill. Its provisions are temporary; but there is another bill on your table, somewhat akin to this, which is intended to be permanent, to extend to all part of the country, and to protect persons of all races in equal civil rights.

(continued...)

(Rep. Donnelly) (describing black codes in southern states).

Trumbull proceeded to describe Section 1 of the Bill, which he called "the basis of the whole bill." ¹⁴. at 474.²²/ After noting his proposal to amend §1 by adding a preliminary phrase declaring that all persons of African descent shall be citizens of the United States, he stated that civil or natural liberty was the right of every citizen:

²²/(...continued)

¹⁴. (emphasis added). Senator Wilson agreed:

[T]he amendment to the Constitution empowers us to pass the necessary legislation to make them free indeed; and the Senator [Trumbull] has a bill that is to follow this, and is to be passed I think, annulling these black codes and putting these people under the protection of just and equal laws.

¹⁴. at 340 (Jan. 22, 1866)

²²/The remaining sections contained "necessary machinery to give effect to what are declared to be the rights of all persons in the first section...." ¹⁴.

...I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution is prohibited.

Id. (emphasis added).

Senator Trumbull then considered Section 2 of the Bill. (See App. at 1). This section was part of the "machinery to carry [Section 1] into effect." *Id.* at 475. According to Trumbull, "A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill." *Id.*¹² Thus, this section "merely punishes persons who violate what it is admitted that they ought not to

¹²The Court in the Civil Rights Cases, 109 U.S. 3 (1883), would describe §2 as "really the effective part of the law." *Id.* at 16. Its genesis is discussed in Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); United States v. Williams, 341 U.S. 70 (1951).

violate." *Id.* at 605 (Feb. 2, 1866) (Sen. Trumbull).

The third section, Senator Trumbull described in part, as follows:

The third section of the bill provides for giving to the courts of the United States jurisdiction over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by state law or customs.

Id. at 475 (emphasis added). Concluding his explanation, Senator Trumbull said:

It may be assailed as drawing to the Federal Government powers that properly belong to the "States;" but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.

Id. at 476. See also *id.* at 599-600 (Feb. 2, 1866); *Id.* at 602 (Sen. Lane); *Id.* at 603 (Sen. Wilson).

Just before the Senate voted on the measure, Senator Trumbull stated:

Agreeing as I do... that all slave codes fall with slavery, that it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves, yet if they will not do it, and Congress has authority to do it under the Constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution? That is all we propose to do.

Id. at 604. The bill carried 33 to 12. Id. at 606-607.

b. The Debates in the House of Representatives

The House debates following Senate passage reflect a similar purpose. Representative Wilson of Iowa, Chairman of the House Judiciary Committee declared "It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color or previous condition of slavery.'" Id. at 1118 (March 1,

1866) (emphasis added). "[W]e may protect a citizen of the United States against a violation of his rights by the law of a single State." Id. at 1119.^{60/}

Representative Cook of Illinois added his voice:

Now sir, I am prepared, for myself, to say that when those rights which are enumerated in this bill are denied to any class of men on account of race or color, when they are subject to a system of vagrant laws which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom.

. . .

^{60/} Later, Rep. Wilson would ask in debate:

And if they are entitled, as citizens of the United States, to those rights, are they entitled to protection of those rights from the hands of Government? And should a State enact laws and attempt to enforce them which will deprive the citizens of the United States of those rights, may we not intervene to protect them in spite of those laws of the State?

Id. at App. 157 (March 8, 1866).

Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold.

Id. at 1124 (emphasis added) ^{51/}

Representative Thayer, making his point by the effective use of repetition, observed later the same day:

Sir, if it is competent for the new-formed Legislatures of the rebel States to enact laws which oppress this large class of people who are

^{51/}Decrying such laws, and noting ruefully that there was no possibility that "these States will secure [the freedman] in those rights" specified in the bill and that the states had, "already spoken through their Legislatures" and produced acts which "have been set aside by [federal] military commanders," Rep. Cook announced:

To my mind the conclusion is irresistible that the second section of [the Thirteenth] amendment of the Constitution... gives us the right to protect these men against precisely such a system of legislation as the one to which I have referred. If it does not it is worth nothing.

Id. (emphasis added).

dependent for protection upon the United States Government, to retain them still in a state of real servitude; if it is practicable for these Legislatures to pass laws and enforce laws which reduce this class of people to the condition of bondmen; laws which prevent the enjoyment of the fundamental rights of citizenship; laws which declare for example, that they shall not have the privilege of purchasing a home for themselves and their families; laws which impair their ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and [in] which they declare them vagrants because they have no homes and because they have no employment; I say, if it is competent for these Legislatures to pass and enforce such laws, then I demand to know, of what practical value is the amendment abolishing slavery in the United States?

Id. at 1151 (emphasis added); See id. at 1152, 1153 (referring to the "tyranny of laws" passed by the reconstructed legislature of a number of Southern States which would destroy the liberty of freedmen). See also id. at 1160 (Rep. Windom, Minn.) (pointing to the "wrongs ... inflicted upon the freedmen by

communities and states" under the black codes and the lack of protection received from civil authorities in their states).^{62/}

Rep. Shellabarger (Ohio), in the days just before the House vote on S.61, stated that the "whole effect" of Section 1

is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery.

. . .

[Section 1] secures - not to all citizens, but to all races as races who are citizens - equality of

^{62/} Representative Raymond of New York, who would oppose the measure, added:

And now, as to the particular bill which we are discussing, it is intended to secure these citizens against injustice that may be done them in the courts of the State within which they may reside. It is intended to prevent unequal legislation in those States affecting them injuriously. That is a high and proper object.

14. at 1267 (March 8) (emphasis added).

protection in those enumerated civil rights which the States may deem proper to confer upon any races.

. . .

If the State may abridge or destroy the rights of citizenship which the United States confers and is bound to secure, and must even levy war to protect against the slightest outrage by a foreign government, then the United States is no nation....It must here be noted that, the violations in citizens' rights, which are reached and punished by this bill, are those which are inflicted under "color of law" & c. The bill does not reach mere private wrongs, but only those done under color of State authority; and that authority must be extended on account of the race or color. It is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it.

Id. at 1293-1294 (March 9, 1866) (emphasis added).^{12/}

^{12/} Representative Shellabarger's comments appear to reflect an understanding evident elsewhere in the Congressional debates that the scope of Section 2 of the bill was coextensive with Section 1. Thus, in an exchange with Representative Loam on why the "color of law" limitation appears in Section 2, Representative Wilson explained: "That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under color of these local laws shall do these things shall be liable to this punishment." Id. at 1120 (March 1, 1866). Representative Loam understood this provision to apply only to "officers" of the state, and therefore inquired why the whole community, including "others than officers," should not be punished for committing wrongs under the statutes. Representative Wilson replied that Congress was not seeking to impose a general criminal code on the states and that in this bill it had, as Loam suggested, sought to eliminate the offensive state laws, but that "[a] law without a sanction is of very little force." Id.

Representative Kerr (Indiana) who opposed the measure, also viewed Sections 1 and 2 together: "Viewing [the second section] and the first section of the bill together", he said, "we learn that the proposed statute is both remedial and penal in its character. It proposes to protect certain rights and punish for the failure to protect them." Id. at 1270. (March 8, 1866).

Thus, the object of the Civil Rights Act was clear to the legislators as a vote drew near in the House.

c. The Draft of the Bingham Amendment To Provide a Civil Suit For Violators of the Act.

The Bingham Amendment to the motion to recommit the Civil Rights bill and Representative Wilson's response to the motion gives weighty support to the proposition that suits for private acts of discrimination were not contemplated by the 1866 Act. On March 9, Representative Bingham, who would vote against the Civil Rights Bill, moved to amend a motion to recommit the bill, to provide additional instructions. His amendment had two aspects.

First:

With instructions to strike out of the first section the words "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery" and

insert in the thirteenth line of the first section, after the word "right" the words "in every State and Territory of the United States."

Cong. Globe, 39th Cong., 1st Sess. 1271-1272 (March 9, 1866).

Second:

Also to strike out all parts of said bill which are penal, and which authorize criminal proceedings, and in lieu thereof to give to all citizens injured by denial or violation of any of the other rights secured or protected by said act an action in the United States courts with double costs in all cases of recovery, without regard to the amount of damages; and also to secure to such persons the privilege of the writ of habeas corpus.

Id. at 1272.

The first proposal, after being rejected on motion, was ultimately adopted. The "no-discrimination" clause of §1 was deleted from the statute and the designated phrase was inserted. See id. at 1296 (March 9); id. at 1366 (March 13); id. at 1367 (March

13).¹⁴ The basis for Bingham's objection as to the no-discrimination clause, according to him, was that "there is scarcely a State in the Union which does not, by its constitution or state laws, make some discrimination on account of race or color between citizens of the United States in respect to civil rights." Id. at 1291 (March 9). To avoid any possible "latitudinarian construction not intended." Id. at 1367 (Rep. Wilson) (March 13),¹⁵ the change was agreed to.

However, the second proposal failed. Representative Bingham saw the criminal sanction of §2 as "the same thing" as a discrimination clause intended to have the force of law. Id. at 1291 (March 9). He denied "the power of Congress to make an error

¹⁴The phrase, "in every State and Territory of the United States," was added later.

¹⁵For example, the possibility of suffrage.

of judgment in a State officer [by enforcing a discriminatory state provision] a crime to be punished by imprisonment." *Id.* Therefore, he sought to substitute a federal civil remedy for damages which would be available "to all citizens ... injured by denial or violation of any of the other rights secured or protected by said act...." *Id.* at 1292.

Representative Wilson attacked the proposal as no different in principle from Section 2 of the bill, and as an inadequate substitute for a criminal sanction. He argued:

The amendment of the gentleman recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, it is mockery.... Under the amendment of the gentleman the citizen can only receive that protection in the form of a few dollars in the way of damages, if he shall be so fortunate as to recover a verdict against a solvent wrong-

doer. This is called protection. This is what we are asked to do in the way of enforcing the bill of rights. Dollars are weighed against the right of life, liberty, and property. The verdict of a jury is to cover all wrongs and discharge the obligations of the Government to its citizens.

Sir, I cannot see the justice of that doctrine. I assert that it is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant on it.

Id. at 1293 (March 9). Bingham's proposal floundered.

The rejection of the Bingham Amendment suggests that Congress never intended to authorize a federal civil action for private acts of discrimination.¹⁴ Even Rep. Bingham's broad proposal, which might have included civil suits, as well as suits against public officials, was viewed as

¹⁴/See *Mahone v. Waddle*, 944 F.2d at 1037-1041, 1044-1049 (Carth, J. dissenting).

applying to state officials only, and on that basis was rejected.

The Civil Rights bill readily passed the House, but was vetoed by President Johnson. *Id.* at 1367 (March 19, 1866), 1679-1681 (March 27).

d. The Debates To Override In The Senate

The debates in the Senate following the veto continue to show that purely private acts of discrimination were not within the contemplation of the Congress which passed the Civil Rights Act.

Addressing the jurisdictional provisions of Section 3, Senator Trumbull said that the provision giving federal courts authority over cases "affecting persons" who were denied or could not enforce their Section 1 rights in state courts, were intended merely to provide supervisory roles for the district and circuit courts. Even if there was a

discriminatory custom in the community or hostile state legislation, which therefore was void under the federal law, the federal court would not be receptive to a case until such time as it became clear that the victim was unable to obtain relief, usually through a challenge from an adverse decision in state court. Thus, there is no provision included in the statute for a federal remedy for private discriminatory acts. Cong. Globe, 39th Cong., 1st Sess. 1737 (April 4). Further, Sen. Trumbull said, in words dispositive of the issue:

This bill in no manner interferes with the municipal regulations of any state which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the United States of the Union.

Id. at 1761 (emphasis added). See also *id.* at 1785 (April 5) (Sen. Stewart). The override carried in the Senate by a vote of 33 to 15.

Id. at 1809 (April 6).

e. The Debates to Override in the House

The remarks of members of Congress in the House strongly support the Respondent's position here. Thus, Representative Lawrence said on April 7:

The bill does not declare who should or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and undeniable rights, pertaining to every citizen, which cannot be abolished or by State constitution or laws.

• • •
It is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by State authority of the means by which citizens may exist.⁶⁷

⁶⁷/Representative Lawrence continued:

Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.

(continued...)

Cong. Globe, 39th Cong., 2d Sess. 1832-1833 (April 7).

Rep. Lawrence similarly continued:

The whole question of the power of Congress to enact this bill is resolved into this: when the Constitution recognizes and secures rights which are denied by State laws, may Congress declare it a crime to execute or enforce constitutional laws, to deprive a citizen of a constitutional right?

⁶⁷/(...continued)

If the people of a State should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be prohibitory legislation. If the State should simply enact laws for native-born citizens and provide no law under which naturalized citizens could enjoy any of these rights, and should deny them all protection of civil process or penal enactments, that would be a denial of justice.

Id. (emphasis added): See also id. at 1833.

Id. at 1836.^{61/}

The President's veto was overridden in the House by a margin of 122-41 and the Civil Rights Act became law. Id. at 1861 (April 9, 1866).

In light of this overwhelming, consistent view of the legislation Congress was enacting, the Court's current interpretation of §1981 cannot be supported. For if the guarantee of the right to make and

^{61/}Or. put another way by Representative Lawrence:

[I]f a State, by her laws, says to whole classes of nature or naturalized citizen, "You shall not buy a house or a homestead to shelter your children within our borders;" "you shall be deprived of the means whereby life is preserved, whereby liberty is a boon, and whereby property is held sacred" "you shall have no right to sue in our courts or make contracts" - in such cases, is the nation powerless to intervene in behalf of her own citizens, in behalf of humanity itself, to avert the annihilation of citizenship?

Id. at 1835 (Rep. Lawrence).

enforce contracts and to buy and sell property were viewed as encompassing a prohibition on private discrimination, the legislative history would have been more dispositive of the Petitioner's contentions.

3. Petitioner's Contentions in Support of Jones are Unpersuasive.

a. The Schurz Report.

The arguments mustered by Petitioner in support of the Jones interpretation of the 1866 Civil Rights Act are not compelling. Her initial argument is that the problems which Congress intended to remedy were largely caused by private action (Pet. Br. at 15-40). She relies heavily upon the Report of General Carl Schurz,^{62/} and to a lesser extent, those

^{62/}Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2 (1865).

of Generals O.O. Howard^{10/} and U.S. Grant,^{11/} and testimony before the Joint Committee on Reconstruction.^{12/}

The short answer to the argument based on the Schurz report was provided by Justice Harlan, dissenting in *JONES*:

The Court also gives prominence [*See* 392 U.S. at 428-429] to a report by General Carl Schurz which described private as well as official discrimination against freedmen in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

392 U.S. at 462 n. 28. Indeed, by the time the Schurz Report was finally released to the Senate on December 19, 1865 and Senator Sumner

^{10/}Report of O.O. Howard, H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 26 (1866)

^{11/}*See* Cong. Globe, 39th Cong., 1st Sess. 78.

^{12/}Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866).

demanded that the entire Report be read aloud on the Floor (Pet. Br. at 17). Sumner's colleague from Massachusetts, Senator Wilson, had already introduced S.9, focusing the Senate's attention on recent black codes in Southern states, some still awaiting passage. Cong. Globe, 39th Cong., 1st Sess., 39 (Dec. 13, 1865). Wilson would renew his insistence that these black codes be annulled two days after the Schurz Report was introduced. *Id.* at 111 (Dec. 21). Thus, although S.9 did not pass, a basic legislative approach had already been formulated by the time the Schurz Report came out. *See, supra*, at 64 n. 37. That Senator Trumbull, when he introduced the Civil Rights Act, made no mention of the Report -- but did emphasize the black codes -- further undermines Petitioner's argument. Cong.

Globe, 39th Cong., 1st Sess. 494 (Jan. 29, 1866); *See*, *SUPRA*, at 42-48.^{21/}

b. The Joint Committee Report

Similarly, Petitioner's extensive reliance on the Joint Committee debates is unavailing (Pet. Br. at 27-40). Although she describes it at great length, only three specific references to the debates on the 1866 Act are offered. (*Id.* at 45 n. 48). The first, by Representative Raymond, was made in the context of his sardonic criticism of unreliable newspaper accounts being offered as evidence in Congressional argument; he stated he wanted to examine the testimony before the Joint Committee before deciding how to vote on

^{21/}The Howard and Grant Reports require even less attention (Pet. Br. at 25-27). Petitioner can summon up only one citation to the Civil Rights Act debates, a fleeting reference to the Grant Report. (*Id.* at 27). It cannot have had any significant impact on the legislation.

the bill. Cong. Globe, 39th Cong., 1st Sess. 1267 (March 9, 1866).^{22/}

The next record reference consists of excerpts from testimony and correspondence before the Committee which were inserted in the record by Rep. Lawrence as part of his remarks to override the Presidential veto. *Id.* at 1833-34 (April 7). This diffuse material, however, was employed to show the need for legislation where "a State, by her laws, says to whole classes of native or naturalized citizens -- you shall have no right to sue in our courts or make contracts ...". *Id.* at 1835.^{23/}

^{22/}Henry Jarvis Raymond was editor of the New York Times, as well as a Member of Congress. He did not vote on S. 61 the first time it came up in the House; on the question whether to override President Johnson's veto, he voted against passage. *Id.* at 1267, 1261. (March 13, April 9).

^{23/}General Terry's testimony included specific references to fear of persecution of freedmen through the courts, as well as privately, and General Thomas alluded to his concern that, absent troops, freedmen

(continued...)

The remarks of Representative Clarke also fail to support Petitioner's contention. His statements do refer to testimony of "southern animus," but he emphasized the obnoxious black codes and vagrancy laws passed in Alabama, Mississippi, Kentucky and elsewhere. *Id.* at 1838-1839.

Reliance on an opponents' construction of proposed legislation is always risky business, and especially so in the case of Senator Garret Davis' comments. (Pet. Br. at 48-51). This unreconstructed Democrat was quick to wave the "bloody flag" of racial intermarriage and rape, and to utter dire warnings as to the scope of the bill. Cong. Globe, 1st Sess. 598 (Feb. 2), and App. 182-

^{23/}(...continued)

would be "thrown back into a condition of virtual slavery," being "compelled by legislative enactment to labor for little or no wages, and legislation would assume such form that they would not dare to leave their employers for fear of punishment" *Id.* at 1834, 1835.

183 (Apr. 6). It does not appear that anyone paid him much notice. Nevertheless, Petitioner adverts to Representative Davis's alarm that the bill would apply to railroads, streetcars, hotels and certain other enterprises, as well as churches. (Br. at 49). Nowhere, however, does Davis indicate that it would give rise to a civil action for purely private discrimination. In any event, this does not appear to have been understood as the intent of the proponents.^{24/}

^{24/}The Cincinnati Commercial, a conservative Republican newspaper initially expressed fear that the bill would require the opening of "hotels, churches and theaters without distinction the basis of color." Cincinnati Commercial, March 30, 1866 at 4; *Id.*, April 30, 1866 at 2 (column of "M_____"). However, after being assuaged by proponents of the bill, including "influential members" of the Ohio delegation that the prohibitions would not apply to Ohio, but only to states with black codes, the Commercial abandoned its objection. *Id.*, Apr. 16, 1866 at 6; *Id.*, April 21, 1866 at 4. The Philadelphia North American expressed a similar view, that the bill would not apply to the "right" to "go to any car, coach, hotel, church [or] public place." *Id.*, Apr. 10, 1866, at 2, c.1. Malta, Reconstruction, supra, at 263.

(continued...)

Petitioner's argument that a comparison of the Freedman's Bureau Bill and Section 1 of the Civil Rights Act (Pet. Br. 31-34) does not require a conclusion that the latter was intended to address private action. A local official might well act out of personal prejudice not embodied in a community or governmentally-sanctioned custom.

Petitioner's remaining contentions criticising Justice Harlan's reliance on certain quotations from members of the Thirty-Ninth Congress as inappropriate, or that his reading of them was wrong, are contextual in

11/(...continued)

Moreover, the nature of the facilities described in Davis' remarks were public in character. Thus, in explaining H.R. 473, 42nd Cong., 2d Sess., during the debates on the Civil Rights Act of 1873, Rep. Lawrence described facilities run by inn-keepers, common carriers (whether by land or water), theaters and other places of public amusement, as "enumerated classes of public institutions created and protected for public purposes by authority of either common or statutory law, or both." Cong. Rec. (H)412 (43rd Cong., 1st Sess., 1874). Thus, it was well established that such locations were public in nature. *See, supra*, 34 n. 10.

nature. We believe the remarks quoted earlier lay to rest any doubt as to object of the Act. *See, supra*, at 60-63. It is unnecessary to deny the existence of private acts of discrimination to conclude that mainstream Republicans of this era were more interested in reconstructing state governments in order to resume their local responsibilities and to take their place in the Union without slavery, than in overwhelming the small federal court system with a deluge of civil lawsuits -- an inevitable consequence of Petitioner's position given the credence attached to the findings of Generals Schurz and Howard, and the Joint Committee.^{11/}

^{11/}*Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 520 (1842), and *Kentucky v. Dennison*, 65 U.S. (24 How.) 64 (1861), do not aid Petitioner's argument (*See* Pet. Br. at 70-71). They denied the authority of the federal government to impose any legal obligation on a state judicial or executive officer to perform duties on behalf of the federal government. Concededly, Congress did not view this pre-war outgrowth of States rights and equal sovereignty doctrines as preventing it from
(continued...)

POINT III

CONCERNS FOR STARE DECISIS SHOULD NOT PREVENT
THE COURT FROM OVERRULING BUNYON

The conclusion that Bunyon was incorrectly decided should impel this Court to reconsider and overrule it. Section 1981 was not intended to create a federal cause of

II/ (...continued)

imposing Section 2 criminal sanctions on state officers for violations of the Civil Rights Act. No reason appears why it should have balked at imposing civil liability on them, as well. In other words, once Congress repudiated this aspect of Prigg, there is no force to the suggestion that private acts of discrimination were the focus of the 1866 Act's civil remedies.

The intriguing issue raised by Prigg is whether the Act intended to create any federal civil action for its violation, even as against public officials. The drafters' construction of Section 3 certainly leaves open the possibility that it did not. See, supra, at 67-68. Criminal sanctions assured that no state officer would suffer liability unless his violation was established beyond a reasonable doubt. This would have had a moderating influence on efforts to invoke the statute against officials. The same inhibition would not exist in civil actions.

action for private acts of racial discrimination. If a federal cause of action is to be established, it is for Congress and not the Court to do so.

Stare decisis should not deter the Court from correcting its error. As we shall demonstrate, neither the doctrine nor the concerns which undergird it compel forbearance.

A. Perpetuation of the Rule in Bunyon Would Breach the Separation of Powers Ordained By the Constitution.

Perpetuating an erroneous decision which creates a federal cause of action would be tantamount to legislation by the judicial branch. Sustaining Bunyon would lead to this undesirable result.

The separation of powers is based on the idea that the power to make law is vested in the legislative branch, the power to execute law is vested in the executive branch,

and the power to interpret law is vested in the judicial branch. Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 213 U.S. (10 Wheat) 1, 42 (1825). While the three branches of government cannot be hermetically sealed, Buckley v. Valeo, 424 U.S. 1, 121 (1976), the Court has "consistently ... emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government...." Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981). "[I]n carrying out that constitutional division...it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to...the Judicial branch...." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405-406 (1928).

Here, that forbidden transfer is the natural consequence of upholding Runyon. Yet,

it is precisely what is urged upon the Court by the Members of Congress.^{22/} They assert:

The interests of the amici would be adversely affected by the overruling of Runyon. The legislative effort necessary to restore this Court's original interpretation would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.^{23/}

This statement is both ironic and disappointing. What is presented here is the spectacle of Members of Congress saying that they would be unable to enact any legislation

^{22/} Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as Amici Curiae in Support of Petitioner. Since the brief was filed, additional members of the House of Representatives have joined in it.

We recognize, of course, that these Members participate here as individuals. Nevertheless, they constitute, respectively, approximately two-thirds of the membership of the Senate and nearly one-third of the membership of the House.

^{23/} Id. at 2.

today comparable to §1981. Any such bill, the legislators assert, would fall victim to intense and widespread controversy and the members of the two houses would become embroiled over "peripheral questions" with respect to the scope of the bill.

Because they fear failure, the Members argue that the Court should substitute itself for Congress and perform a legislative function by adhering to the previous mistaken reading of §1981. The matters about which the amici express concern -- open debate, the shaping of the bill and eventual time-consuming compromise -- are the very essence of a democratic legislative process. By what authority, however, would this Court be expected to perpetuate an erroneous decision "legislating" a cause of action which Congress could not pass? It cannot, by any found in the Constitution. Nor is any satisfactory basis suggested by the Members of Congress.

If Congress could not today pass §1981 as viewed in Runyon, the Court should not reenact it by judicial fiat.

The Members of Congress, therefore, unwittingly make a powerful argument for overruling Runyon. It may be more efficient for the Court to impose legislation by judicial fiat than for Congress to act; however, our system dictates otherwise. The duty to legislate is Congress' and not the Court's. The Framers of the Constitution intended that this be so.

As we discuss below, *stare decisis* does not require the Court to sacrifice respect for constitutional limitations or fidelity to historical intent in this case.

B. Flexibility Is Inherent In *Stare Decisis*

The Supreme Court has regularly overruled its decisions.^{80/} Many of these instances involve statutory questions. One commentator has counted twenty-six cases between 1961 and 1987 explicitly overruling statutory precedents, twenty-four cases implicitly overruling such precedents and thirty-five cases in which the Court has disavowed significant reasoning in statutory precedents.^{81/} Thus, rigid adherence to statutory precedent has not been a hallmark of the Court's jurisprudence.

Stare Decisis et non quieta movere

- "the doctrine that teaches judges that it is

^{80/} The Constitution of the United States of America. Analysis and Interpretation, 8. Dec. No. 16, 99th Cong., 1st Sess. at 2117-2127 (1989), as supplemented by 1988 Supp., 8. Dec. No. 9, 100th Cong., 1st Sess. at 143 (1987). This compilation lists 184 cases through July 7, 1986. Id. at Supp. 143.

^{81/} Eskridge, Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1427-1438 (Tables A-C) (1988).

often wise to let sleeping dogs lie^{82/}--is not an unbending rule, but a guideline for decision making. It recognizes that the durability of judicial decisions interpreting legislation often rests upon their fidelity to the enactors' intent. As Justice Harlan stated in Monroe v. Pape, 365 U.S. 167 (1961), addressing the 1971 Ku Klux Klan Act:

From my point of view, the policy of *stare decisis* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of Congressional acceptance of this Court's earlier interpretation, require that it appears beyond doubt from the legislative history of the ...statute that [the Court's earlier interpretations] misapprehended the meaning of the controlling provision, before a departure from

^{82/} J.P. Stevens, The Life Span of a Judge, Madge Balg. 38 N.Y.U. L. Rev. 1 (1983). Justice Stevens quotes other, more literal translations. There is no suggestion that Justice Stevens had any particular decisions in mind in uttering his very free translation e.g., "to stand by the decisions and not to disturb settled points," from Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 31 A.B.A.J. 301-02 (1945), Id. at n.1.

what was decided in those cases would be justified.

Id. at 192 (footnote omitted) (concurring opinion). Moreover, the arguments need not be new ones; "[t]hat the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it." Thornburgh v. American College of Obstetricians, ___ U.S. ___, 106 S. Ct. 2169, 2193 (1986) (White, J., dissenting).^{81/}

However, Justice Harlan's test has been viewed only as "the most stringent test for the propriety of overruling a statutory decision," Monell v. Department of Social Services of the City of New York, 436 U.S.

^{81/} That this observation pertained to whether a precedent "departs from a proper understanding" of the Constitution, id., does not make it any less applicable to the "issue raised in a statutory context", as framed by Justice Harlan. See Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 559 (1985).

658, 700 (1978)^{84/}; Johnson v. Transportation Agency, Santa Clara Co., ___ U.S. ___, 107 S. Ct. 1442, 1474 (1987) (Scalia, J., dissenting); cf. Monell, supra, 436 U.S. at 718-19 (Rehnquist, J., dissenting) ("...one's only task is to discern the intent of the 42nd Congress")^{85/}; Braden v. 10th Judicial Cir. Ct. of Kentucky, 410 U.S. 484, 502 (1973) (Rehnquist, J., dissenting).

Other articulations suggest that different concerns may also contribute to overruling precedent. In Boys Markets, Inc.

^{84/} The Court in Monell noted that it had not expressly adopted Justice Harlan's test, id. at 700 n. 65, suggesting that a more relaxed standard might be available.

^{85/} Even Justice Stevens, a strong advocate of *stare decisis*, has allowed that "[t]here may, of course, be situations in which a past error is sufficiently blatant 'to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute.'" Commissioner v. Fink, ___ U.S. ___, 107 S. Ct. 2729, 2737 (1987) (Stevens, J., dissenting), citing Square D Co. v. Niagara Frontier Tariff Bureau, ___ U.S. ___, 106 S. Ct. 1922, 1930 (1986).

v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970), the Court illustrates this by quoting from an earlier decision:

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Id. at 242, quoting Helvering v. Hallock, 309 U.S. 106, 119 (1939) (per Frankfurter, J.). And in Baldwin v. State of New York, 399 U.S. 117 (1970), Justice Harlan observed:

The principle of *stare decisis* is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure.... Woodenly applied...it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings - old or recent - or reconsidered settled dicta where the principles announced prove either practically...or

jurisprudentially ...unworkable, or no longer suited to contemporary life.

Id. at 127-128 (Harlan, J., concurring and dissenting) (citations omitted).

Justice Douglas also endorsed a flexible approach to *stare decisis*:

It is, I think, a healthy practice (too infrequently followed) for a court to reexamine its own doctrine. Legislative correction of judicial errors is often difficult to effect. Moreover, responsible government shall entail the undoing of wrongs committed in the department in question. That course is faithful to democratic traditions. Respect for any tribunal is increased if it stands ready (save where injustice to intervening rights would occur) not only to correct the errors of others but also to confess its own.

Douglas, Stare Decisis, 49 Col. L. Rev. 735, 746-47 (1949).

In the field of civil rights, this flexibility has been noticeable too. In Greenwood v. Peacock, 384 U.S. 808 (1966), for example, the Court made clear in a case construing 28 U.S.C. §1443, that it would not

follow *stare decisis* out of blind adherence, but determine after "independent consideration" of disputed precedents whether to sustain or overrule them. As Justice Scalia has noted, "this Court has applied the doctrine of *stare decisis* to civil rights laws less vigorously than to other laws." Johnson v. Transportation Agency, 107 S. Ct. at 1473 (dissenting opinion), citing Maine v. Thiboutot, 448 U.S. at 33 (1980) (Powell, J., dissenting); Monroe v. Pape, 365 U.S. at 221-222 (Frankfurter, J., dissenting in part). This flexibility should not be diminished because the doctrine's application here may serve to restrict liability, rather than to expand it. Patterson v. McLean Credit Union, ___ U.S. ___, 108 S.Ct. ___ 56 U.S. L.W. 3735 (April 25, 1988) (per curiam) (ordering reargument).

C. This Case Calls For Application Of A Flexible Approach To Stare Decisis.

The present case, especially, calls for a cautious regard for precedent. That the Court should recently discover that §1981 authorized suits for private acts of discrimination, "a fact that [the Court's] decisions had kept a closely guarded secret for more than a century,"^{86/} must itself raise serious doubt. The Court early and consistently interpreted the Civil Rights Act of 1866, the Fourteenth Amendment as addressing state laws and conduct which imposed disabilities on blacks and deprived them of equal treatment in legal proceedings and punishments, rather than purely private acts by individuals.^{87/} (dictum).

^{86/} 18 Moore's Fed. Prac. para. 0.402 [3] n.5 (1988).

^{87/} Bylew v. United States, 80 U.S. (13 Wall.) 381, 393, 396-397 (1871) (majority and dissenting opinions); Slaughter-House Cases, 83 U.S. (16 Wall) 36, 81 (1873); United States v. Cruikshank, 92 U.S. 542, (continued...)

Later decisions continued to support the proposition that purely private conduct could not be actionable under §1981. ^{88/}

Nevertheless, Congress did not act. No legislation was passed making §1981 applicable to purely private conduct. The decision in Jones, therefore, represented an abrupt departure from what had been accepted

^{87/}(...continued)

394 (1876); Strauder v. West Virginia, 100 U.S. 303, 311-312 (1880); United States v. Harris, 106 U.S. 629, 642-644 (1882); and, of course, The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) ("[The 1866 Act] is clearly corrective in character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. *Id.* at 25.)).

^{88/}See Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886); Hodges v. United States, 203 U.S. 1 (1906), overruled, Jones, *supra*, at 441-443 n.78; cf. Corrigan v. Buckley, 271 U.S. 323, 324 (Rev. Stat §1978). Hurd v. Hodge, 334 U.S. 24 (1948)(§1982).

as the reach of the statute.^{89/} Its entitlement to adherence is diminished in these circumstances. "[I]f changes [were] to be made in the long-settled interpretation of the provisions of this century-old ... statute, it [was] for Congress and not this Court to make them." Johnson v. Mississippi, 421 U.S. 213, 227 (1975), quoting City of Greenwood v. Peacock, 384 U.S. 808, 834 (1966). Cf. Monell, *supra*, 436 U.S. at 695-696 (*stare decisis* no bar to correction of earlier decision's departure from longstanding prior practice); Johnson v. Transportation Agency, *supra*, 107 S.Ct. at 1473 (Scalia, J., dissenting).

^{89/}The "under color" requirement of §2 of the Civil Rights Act and Revised Statutes §1979 (presently 42 U.S.C. §1983) had evolved to permit the inclusion of private persons, but to come within the statute, they had to be jointly engaged with state officials in prohibited conduct. United States v. Price, 383 U.S. 787, 795 (1966).

Moreover, despite its holding in Runyon, the Court has refused to analogize a violation of §1981 to a suit for interference with contractual rights for purposes of selecting an appropriate state statute of limitations, finding that "[t]he provision asserts, in effect, that competence and capacity to contract shall not depend upon race." Goodman v. Lukens Steel Co., ___ U.S. ___, 107 S.Ct. 2617, 2621 (1987)

Competence and capacity to contract are conferred by law or deprived by law; purely private acts cannot affect them. If that is what §1981 stands for, Runyon and Jones cannot be right.

Similarly, the bedrock rationale of the intent requirement of General Building Contractors Assoc., Inc. v. Pennsylvania, 458 U.S. 375 (1982), that in §1981,

Congress acted ... to protect the freedom from intentional discrimination by those whose object was "to make their former slaves

dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.",

458 U.S. at 388,^{20/} and that, according to the supporters, "the legislation was designed to eradicate blatant deprivations of civil rights^{21/}, clearly fashioned with the purpose of oppressing the former slaves," id., again point to a larger, more systemic and forceful object than mere private acts of discrimination, even those performed intentionally. They point to laws, state actions, and actions taken under color of law or custom.

The Court's decisions following Runyon, therefore, neither fully nor easily

^{20/}Quoting Cong. Globe, 39th Cong., 1st Sess. 1839 (1866)(Rep. Clarke). Id.

^{21/}The term "civil rights" is defined as the drafters employed it. Cf. St. Francis College v. Al-Khazraji, ___ U.S. ___, 107 S.Ct. 2022, 2026-2027 (1987) (discussing the term "race" as used in §1981).

accept its rationale.

D. The Principal Concern of Stare Decisis Would Be Preserved Despite The Overruling of Runyon.

"[O]ften considered the mainstay of *stare decisis*," is the "desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Here, the absence of Runyon would not materially affect this concern.

Patently, the law can offer no guide or plan for prospective plaintiffs -- the discriminatees in civil rights cases under §1981. Unlike the regulation of securities, taxes or business affairs, §1981 is remedial, not regulatory, in its application. It is concerned with remedying an injury to the individual rights of a person. Goodman v.

Lukens Steel Co., 107 S.Ct. at 2621. "This is not an area of commercial law in which, presumably, individuals have arranged their affairs in reliance on the expectant stability of decision." Monroe v. Pape, 365 U.S. at 221-222 (Frankfurter, J. dissenting in point).^{92/} Therefore, reliance interests would not be materially affected by overruling Runyon.

Furthermore, the large majority of cases brought under §1981 appear to be duplicative of Title VII claims,^{93/} or similar claims that could be brought under state fair employment practice laws.^{94/} These modern

^{92/} See, e.g., N.L.R.B. v. International Longshoremen's Ass'n., ___ U.S. ___, 105 S.Ct. 3045, 3058 (1985) ("In the meantime, management and labor alike have relied on the work-preservation doctrine to guide their bargaining.")

^{93/} The Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. (1981).

^{94/} Eisenberg and Schwab, The Importance of Section 1981, 73 Corn. L. Rev. 596 (1988). Based on statistics drawn from three judicial districts in FY (continued...)

civil rights statutes, which explicitly address employment and other forms of private discrimination and which empower administrative agencies to interpret, administer and often adjudicate disputes under the laws, are far more influential in molding behavior of the public than §1981 which is general in its terms and must depend upon a lawsuit for enforcement.^{94/}

^{94/}(...continued)

1980-1981, the authors conclude that "[e]mployment claims comprise [over] 77% of all filings under the statute." Id.

^{95/}See Brief, Amici Curiae, of the State of New York, et al., [hereinafter "State Attorneys General"] at 20-21 nn. 42-43.

In FY 1984, the last year for which an annual report has been published, the federal Equal Employment Opportunity Commission and FEP agencies under contract with the Commission received 76,198 charges of racial discrimination against private employers. E.E.O.C., 19 Ann. Rep. 22 (1987). In addition, they received 320 charges based on "color" and 14, 184 charges based on national origin, against private employers, id., some of which, at least, might also have constituted claims of racial discrimination under St. Francis College, 107 S.Ct. at 2029 (Brennan, J., concurring).

Although St. Francis College interpreted "race" broadly, the Fifth Circuit has refused to extend Ruyon
(continued...)

Title VII is broader than §1981, even in terms of racial discrimination. See Johnson v. Railway Express Agency, Inc., 421 U.S. at 459 (noting "Title VII's [broad] range and its design as a comprehensive solution for the problem of invidious discrimination in employment....") It is not surprising, therefore, that Justice Blackmun should have recognized here that "it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes." 108 S. Ct. at 1422 (dissenting opinion). There is "substantial overlap" between §1981 and Title VII.^{96/} Id.

^{95/}(...continued)

to alleged discrimination based on alienage. Bhandari, supra.

^{96/}Unless a violation of §1981 can be made out on grounds different from those under Title VII, the Fifth Circuit bars the consideration of §1981 claims. Watson v. Fort Worth Bank & Trust, 798 F.2d 790 at 794 n.4 (5th Cir. 1986) cert. granted, ___ U.S. ___, 107 S.Ct. 3227 (1987) (No. 86-6139). The State Attorneys General point to the fact that Title VII covers only employers with
(continued...)

(Stevens, J., dissenting). Indeed, in their brief, the State Attorneys General concede that "courts fashioning equitable remedies under §1981 can require relief similar to that available under Title VII, such as hiring, promotion, reinstatement, retroactive seniority and affirmative action...."^{22/} -- the very stuff of corrective measures in redress of grievances.

Outside the employment area, other constitutional and statutory grant appropriate

^{25/}(...continued)

fifteen or more employees, and that most state statutes have jurisdictional limits which "approach" that of Title VII (Br. at 20-21). It is noted, however, that the New York State Human Rights Law covers all employers with four or more employees (New York Executive Law, §290 et seq.), id. at 21 n.43, and in the District of Columbia, D.C. Code Ann. §§-2501, et seq. the law covers all employers with one or more employees. In fact, only 11 states have the same jurisdictional limit as the EEOC; the remainder with fair employment practice laws have an average threshold which is considerably lower. 81 Lab. Rel. Rep. (BNA) 451:105-107 (1987).

^{22/}Brief, State Attorneys General, at 20.

of other laws, most notably Titles II and VII of the Civil Rights Act of 1964 (U.S.C. §2000a, et seq.; 42 U.S.C. §2000e, et seq.) and the Fair Housing Act of 1968 (42 U.S.C. 3601, et seq.) are even broader than §1981. Section 1981 is limited to discrimination based on race. Any victims of other invidious forms of discrimination, sex, age, religion, marital status, national origin, handicap and the like, must look elsewhere for relief. Bhandari v. First National Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987).

Accordingly, even if §1981 were to be restricted, little change would be expected in conduct presently affected by the statute. Modern anti-discrimination statutes specially designated for this purpose would continue to

guide private actions and, more broadly, public attitudes.^{2A/}

Raymond Gonzalez, the co-plaintiff in Runyon, was recently interviewed with respect to the reconsideration of that case by this Court and the possibility of a return of §1981 to its original intent. He said:

"Barriers were being broken down very, very fast in those days [1976]," Gonzalez says, adding, "the impact on our family was no where as great as it was for those in the Brown case."

^{2A/}One author notes:

At the time Title VII was enacted, approximately one-half of the 50 states had fair employment statutes. 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark). Today 49 States - all but Alabama - have some form of fair employment statute.

Catania, State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts, 32 Am. L. Rev. 777, 782 n.24 (1983). Similarly, "[i]n some cases, state statutes apply to a broader range of discriminatory acts than are covered by Title VII, or provide a wider range of possible remedies, including recovery of compensatory damages." Wald, Alternatives to Title VII: State Statutory And Common-Law Remedies For Employment Discrimination, 3 Harv. Women's L. J. 35, 42 (1982) (footnotes omitted).

As for the Court's decision overturning the victory he won for his son, Gonzalez is not bothered by the legal debate. He feels the country has changed too much for such ruling to matter greatly.

"Whites are not going to run out and open up schools that will keep out blacks," Gonzalez says. "The population is a lot more enlightened now."

Legal Times of Washington, Vol. XI, No. 2, June 6, 1988.

E. Congressional Actions Regarding §1981 Do Not Prevent The Overruling Of Runyon.

Petitioner argues that Congress has "adopted" the principle that §1981 prohibits private racial discrimination. (Pet. Br. at 71-100). This argument is unsound. Congress' failure to legislate in this area is inconclusive. As stated by Justice Scalia in Johnson v. Transportation Agency, Santa Clara County, supra:

This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise

that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.

Id. at 1473 (dissenting opinion). The failure of Congress to enact legislation can result from a variety of reasons, including:

(1) approval of the status quo, (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id.; Accord. United States v. Stauffer Chemical Co. 684 F.2d 1174, 1184 (6th Cir. 1982).

Here, Congress' actions with respect to certain civil rights legislation do not support Petitioner's argument. See Girouard v. United States, 328 U.S. 61 (1946); Boys Markets, Inc., supra. At most Congress did not wish to tamper with the remedial provisions of Title VII. As this Court has noted: "[U]nsuccessful attempts at legislation are

not the best of guides to legislative intent." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 n.11 (1969). See also Bryant v. Yellen, 447 U.S. 352, 376 (1980); Bob Jones University v. United States, 461 U.S. 574, 600 (1982); City of New Milwaukee v. Illinois and Michigan, 451 U.S. 304, 332 n. 24 (1981). In any event, the views of one Congress in interpreting the legislation of another, much earlier Congress is entitled to very little weight. Russello v. United States, 464 U.S. 16, 25 (1983); Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 165 n. 27 (1983); Consumer Product Safety Com'n. v. GTE Sylvania, Inc., 497 U.S. 102, 118 (1980); International Bro. of Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977);

United States v. Price, 361 U.S. 304, 313 (1960).^{99/}

Petitioner's argument concerning the passage of the Civil Rights Attorney's Fees Award Act of 1976 is equally unpersuasive. As the legislative history of that statute clearly demonstrates, the act's main purpose

^{99/} Indeed, the Tower Amendment in 1964 did not address an individual's ability to seek redress for purely private acts of discriminations. Rather, it sought to "preclude the harassment of businessmen, companies, or unions by more than one Federal agency." Legislative History of Title VII of the Civil Rights of 1964, at 3324. See 110 Cong. Rec. 13650-13652 (1964).

Similarly, the pre-Runyon rejection of the Hruska Amendment in 1972 did not involve an examination of the validity of the §1981 cause of action as applied to private acts of discrimination, and Congress did not alter Title VII as a result. See 110 Cong. Rec. (S) 3172, 3368-3373 (1972). What is more interesting, perhaps, is that the question of §1981 remedies in the context of the proposed extension of Title VII to cover state and local government employees. H. R. Rep. No. 238, 92d Cong., 1st Sess., (1971). In that context, it would not have been directed at private acts of discrimination at all. Indeed, Senator Williams, in opposing the Hruska amendment, was under the gross misapprehension that the 1866 Civil Rights Act had "guided this country for a century...." Id.

was to provide for an award of attorney's fees in cases brought under all the civil rights statutes. Congress was not concerned with the scope of §1981, or any other civil rights law.^{100/} Thus, upon close analysis, Petitioner's claim of Congressional acquiescence in the Runyon decision fails.

^{100/} The Civil Rights Attorney's Fees Award Act of 1976, R.L. 94-559, 42 U.S.C. §1988, upon which Petitioner also relied (Pet. Br. 91-95), does not support her position, either. It sought only to "remedy anomalous gaps in our civil rights laws" created by the Court's decision in Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws," by authorizing "the familiar remedy of reasonable counsel fees to prevailing parties" in civil rights actions. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, 2 (1976). It applies not only to §1981, but to §§1978-1981 of the Revised Statutes (42 U.S.C. §§1982-1986) and 42 U.S.C. §2000d (discrimination in federally assisted program) and 20 U.S.C. §§1681-1686 (International Revenue Code). Congress did not address the merits or scope of any of these provisions; the law was to continue unchanged. 122 Cong. Rec. (H) 35122 (1976) (Rep. Duran). Indeed, "It [was] not the intent of Congress nor [was] it the intent of this statute to encourage persons to sue directly under section 1981 rather than using the services of the [EEOC] under Title VII of the Civil Rights Act." 122 Cong. Rec. (H) 35124 (1976) (Rep. Railsback). A "quick fix" to achieve "consistency" was the entire object.

F. Asserted Reliance Interests Do Not Require Adherence To Runyon.

Although Petitioner contends that Jones and Runyon have engendered "widespread reliance" supporting their reaffirmation. (Pet. Br. 102-106), this assertion must be met with skepticism. Any "reliance" is principally a function of the availability of relief. As the Court stated in Bhandari v. First National Bank of Commerce, supra:

For us, of course, there is no question whether to adhere or not to Jones and McCrory; they are part of our marching orders, mandates which we can either obey or seek other work.

829 F.2d at 1349.

The states can pass their own legislation, as several have.^{101/} That

^{101/} Brief of the States of New York, et al., Amici Curiae, at 19 n. 36. The States assert that they have the power to enact legislation modeled after §1981 as construed in Runyon, but maintain that "the period during which legislatures were acting to do so and administrative agencies were re-tooling to entertain new kinds of changes would certainly be one of confusion or chaos." Id. at 21. Since many states already regulate
(continued...)

attorneys may have relied on the availability of such relief seems the weakest argument of all. That attorneys should advise their clients to forego Title VII or state law remedies specifically created to remedy racial discrimination in the hope of attaining greater damages in a §1981 suit is not a reason for sustaining Runyon.

G. Runyon Should Be Overruled To Maintain Public Faith In the Judiciary.

Public faith in the Court depends upon the Court's integrity. It must interpret statutes with fidelity to the intent of Congress which passed them. If it does not, principled decision-making suffers and the legislative will be violated.

"Wisdom too often never comes, and so one ought not to reject it merely because

^{101/}(...continued)
the subjects covered by the Runyon view of §1981, particularly employment, the argument appears to be overstated.

it comes late." Hensler v. Union Planters Bank, 335 U.S. 595, 600 (Frankfurter, J., dissenting), quoted in Boys Markets, Inc. v. Retail Clerk's Union, Local 770, supra, 398 U.S. at 255 (Stewart, J., concurring). That it follows an earlier contrary interpretation may be unfortunate, but it offers no justification for perpetuating a clear mistake misapprehending the meaning of the statutes. Cloaking this error in *stare decisis* does serve to promote respect for the Court.

On the other hand, overruling Runyon will permit Congress and state legislatures to consider whether and where additional civil rights protection may be needed (as Congress has been doing this year)^{102/} without

^{102/} See proposed Fair Housing Amendments Act of 1988; H.R. 1158. Congress has previously enacted the Immigration Reform and Control Act of 1986, covering certain employment related discrimination based on alienage and national origin. IRCA §102, 8 USC §1342b (Supp. IV 1986).

endangering the policies of existing statutory schemes or burdening the courts with multi-court litigation.

CONCLUSION

For the reasons stated, the Court should reconsider and overrule the holding in Runyon that §1981 prohibits purely private act of discrimination on the basis of race.

Respectfully submitted,

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APPENDICES

(1)

THE CIVIL RIGHTS ACT OF 1866.
ACT OF APRIL 9, 1866
CH. 31, 14 STAT. 27 (1866)

April 9, 1866 CHAP. XXXI -An Act to protect all persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Who are citizens
of the United
States.

their rights and
obligations.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law statute, ordinance, regulation, or custom to the contrary notwithstanding.

Penalty for depriving any person of any right protected by this act, by reason of color or race, & c.

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Courts of the United States to have jurisdiction of offenses under this act.

SEC. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and

Suits commenced in State courts may be removed on defendant's motion.

1863, ch. 90.
Vol. xiii, p.
307

also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in

1863, ch. 87.
Vol. xii, p.
733.

Jurisdiction to
be enforced
according to the
laws of the
United States,
or the common
law, &c.

civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the courts having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

District Attor-
neys, &c., to
institute pro-
ceedings against
all violating
this act.

Sec. 4. And be it further enacted, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's

Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to

Number of com-
missioners
appointed by
circuit and
territorial
courts to be
increased; their
authority.

exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Marshals. &c.,
to obey all
precepts under
this act.
Penalty for
refusal. & c.

Commissioners
may appoint
persons to
execute
warrants.

SEC. 5. And be it further enacted. That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the whom the accused is alleged to have committed the offence. And the better to enable the said commissioner to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other

Authority of
such persons.

Warrants to run
where.

Penalty for
obstructing
process under
this act.

for rescue, &c;

process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

SEC. 6. And be it further enacted. That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person any warrant or process issued under the provision of this act, or charged with the execution of any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully

for harboring,
&c.

assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any for aiding to escape; person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offences may have been committed, or before the proper Court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

Fees of district
attorneys,
marshals,
clerks,
commissioners,
&c;

Sec. 7. And be it further enacted, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar

services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper

to be paid from the treasury of the United States, and to be recoverable from defendant when convicted.

district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

President may direct the judge, &c., to attend, &c., for the more speedy trial of persons charged with violating this act;

SEC. 8. *And be it further enacted.* That whatever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

may enforce the act with the military and naval power.

SEC. 9. *And be it further enacted.* That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

Appeal to the supreme court of the United States.

SEC. 10. *And be it further enacted.* That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

(2)

ENFORCEMENT ACT OF 1870,
CH. 114, 16 STAT. 140-46

An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.

* * *

SECTION 16. *And be it further enacted.* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

SECTION 17. *And be it further enacted.* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens,

shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SECTION 18. *And be it further enacted.* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

(3)

TITLE XXIV
CIVIL RIGHTS

REVISED STATUTES OF THE UNITED STATES
PASSED AT THE FIRST SESSION OF THE FOURTY-
THIRD CONGRESS, 1873-'74

Equal rights
under the law.

31 May, 1870, c.
114, s. 16, v.
16, p. 144.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
[See (858)]

Rights of citizens in respect to real and personal property.

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

9 April, 1866.
c. 31, s. 1, v.
14, p. 27.

Civil action for deprivation of rights.

50 April, 1871.
c. 22, s. 1, v.
27, p. 13.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [See (1343-629).]

(4) §1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind and to no other.

(5) §1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
R.S. §1978.

No. 87-107

Supreme Court, U.S.

F I L E D

SEP 12 1988

U.S. DEPT. OF JUSTICE, JR.

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

vs.

MCLEAN CREDIT UNION,

Respondent.

**On Writ of Certiorari to the United States Court
of Appeals for the Fourth Circuit**

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INTRODUCTION AND SUMMARY

Respondent has failed to propose a coherent and workable definition of the scope of §§ 1981 and 1982. Instead, respondent ignores fundamental problems with arguments for overruling JONES V. MAYER CO., 392 U.S. 409 (1968), and BURTON V. MCCLARY, 427 U.S. 160 (1976). First, respondent fails to deal with Justice Harlan's conclusion in his Jones dissent that the 1866 Civil Rights Act was intended to extend to private discrimination that is "customary" or in accord with "public sentiment." This conclusion is compelled by the language of the Act and by legislative history indicating that it was intended to cover such private discrimination as employers who refused to pay black workers. However, Justice Harlan's intermediate position on coverage of private discrimination would lead the courts into

a quagmire of legal and factual questions concerning the meaning of custom and its proof in individual cases.

Second, respondent's arguments concerning the legislative history of the 1870 Voting Rights Act and the 1874 Revised Statutes are premised on the notion that §§ 1981 and 1982 are different in scope. Respondent thus asks the Court to rule that Jones was correctly decided, but to hold that § 1981, unlike § 1982, does not reach private discrimination. This unlikely incongruity between the scope of §§ 1981 and 1982 would produce strange results and extensive litigation over whether specific transactions can be characterized as "property," rather than "contract."

As we show below, the actions of Congress in 1866, 1870 and 1874 do not support this interpretation of the scope

of § 1981. To the contrary, the legislative history strongly supports the conclusion that both §§ 1981 and 1982 prohibit purely private racial discrimination, as well as state-sponsored discrimination. Furthermore, the unworkability of respondent's position, as well as traditional concepts of congressional ratification and stare decisis, mandate reaffirmation of Jones and Runyon.

I. RESPONDENT'S PROPOSED INTERPRETATION OF SECTION 1981 IS NEITHER WORKABLE NOR CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE 1866 CIVIL RIGHTS ACT

In our opening brief we showed that in 1866 the central problem faced by freedmen was that, although legally able to make contracts, they were prevented by various forms of private discrimination and abuse from making, and enforcing, employment contracts on equitable terms. The income and working conditions of the

freedmen, as Congress was well aware, were in many instances almost as bad as they had been under slavery.¹ Respondent does not seriously dispute our description of the plight of blacks in the south after the end of the Civil War, but argues that Congress made a deliberate decision not to protect the freedmen from much of the mistreatment to which they were then subject.

Although contemporary Fourteenth

¹ Respondent asserts that there is only a single "fleeting reference to the Grant Report." Resp. Rearg. Br. 88. In fact, the Grant Report was read in full on the floor of the Senate, Cong. Globe, 39th Cong., 1st Sess. 78, cited in the debates in both Houses, *id.* at 79, 97, 109-11, 1834, 1839, and reprinted in large quantities by order of Congress, *id.* at 59-60, 67, 129, 136, 160, 265, 422. The Howard Report was also printed by Congress for public distribution. *Id.* at 138. The hearings of the Joint Committee played a pivotal role in the debates on whether to override President Johnson's veto. *Id.* at 1799, 1808, 1827, 1833-35. The Schurz Report played a critical role in the evolution of Congressional reconstruction policy. See Appendix A.

Anendment jurisprudence distinguishes between private and governmental conduct, that was not a distinction of importance to either the supporters or the opponents of the 1866 Civil Rights Act. The Thirteenth Anendment, approved by Congress less than a year earlier, and the constitutional basis for § 1, "extends beyond state action." United States v. Kozminski, 101 L.Ed.2d 788, 804 (1988). Having already taken, by constitutional anendment, the far more drastic step of stripping the former slave owners of their property rights in the slaves, it is unlikely Congress would have balked at the relatively modest additional step of forbidding those slave owners to treat freedmen in a discriminatory manner. Even the critics of the 1866 Act expressed no opposition as such to legislation regulating private conduct;

on the contrary, they repeatedly insisted that they would support such legislation if only the range of abuses it prohibited were narrower.²

An implied distinction between private and public conduct cannot be inferred from the fact that § 1 of the 1866 Act was later reenacted under the authority of the Fourteenth Amendment. As it demonstrated in adopting the 1875 public accommodations law,³ Congress in

² Cong. Globe 39th Cong., 1st Sess. 595-97 (Sen. Davis), 601 (Sen. Guthrie), 1156-57 (Rep. Thornton), 1805 (Sen. Doolittle).

³ Anici suggest that the enactment of this measure shows that Congress believed that discrimination in public accommodations was legal prior to 1875. The debates on the 1875 legislation, however, reveal that many supporters believed that such discrimination was already illegal, and favored the 1875 Act either to remove any doubts about that issue, or to provide an additional remedy, particularly the provision for \$500 liquidated damages in § 2, 18 Stat. 336. See Cong. Globe, 42nd (continued...)

the Reconstruction era believed that it had authority under the Fourteenth Amendment to regulate private conduct, a view that was ultimately accepted by this Court. Compare United States v. Guest, 383 U.S. 745 (1966), with The Civil Rights Cases, 109 U.S. 3 (1883).

Respondent suggests that the highest priority of Reconstruction era Republicans was not protecting the freedmen, but safeguarding the states against the federal government, bringing about the prompt readmission of the former rebel states, and assuring that employer-employee and other contractual relations were not interfered with by statute. Resp. Rearg. Br. 48-51. The political philosophy which respondent

³(...continued)
 Cong., 2d Sess. 3192 (1872)(Sen. Sherman);
 43rd Cong., 1st Sess. 341 (1873)(Rep.
 Butler); Id. at 410 (1874)(Rep. Elliott).

describes, however, is not that of the congressional Republicans, but of President Andrew Johnson, and it is the philosophy which prompted Johnson to veto the 1866 Civil Rights Act.

A. RESPONDENT'S INTERPRETATION OF SECTION 1981 IS NOT WORKABLE

The threshold problem with respondent's analysis is that it does not yield a clear and workable construction of § 1981. Justice Harlan, in his dissenting opinion in *Jones*, did not assert that § 1 of the 1866 Civil Rights Act applies only to state sponsored discrimination, but repeatedly insisted that § 1 extends as well to actions taken by non-officials in line with discriminatory customs.⁴ Justice Harlan

⁴ Justice Harlan's recognition of this application of § 1 was compelled by the terms of § 2, which imposed criminal penalties for violations of § 1 which occurred "under color of any law, (continued...)

urged, for example, that a refusal to pay black workers would be a "custom" within the meaning of § 1, as would an agreement among employers not to hire a former slave without the permission of former master.⁵ Discrimination in public accommodations, Harlan suggested, would also be prohibited by the law if it were a customary

⁴(...continued)
statute, ordinance, regulation or custom." 14 Stat. 27 (emphasis added). Jones v. Mayer Co., 392 U.S. 409, 454-55 (1968) (dissenting opinion). In § 2, unlike provisions of other civil rights legislation of this era, the word "custom" was not modified by the phrase "of any State." Compare 16 Stat. 140; 17 Stat. 13.

⁵ 392 U.S. at 462 ("there was a strong 'custom' of refusing to pay slaves for work done"), 470-71 ("the references to white men's refusals to pay freedmen and their agreements not to hire freedmen without their 'masters' consent are by no means contrary to a 'state action' view of the civil rights bill, since the bill expressly forbade action pursuant to 'custom' and both of these practices reflected 'customs' from the time of slavery").

practice.⁶ Indeed, on Justice Harlan's view any discriminatory practice reflecting a "prevailing public sentiment" would be unlawful.⁷ Although Justice Harlan characterized his interpretation of the 1866 Act as involving a requirement of "state action," he carefully put those two words in quotation marks throughout his opinion, recognizing that he was using the phrase in an unusual and specialized manner.⁸ Respondent

⁶ 392 U.S. at 464 (Senator Davis' assertion that § 1 covered discrimination in accommodations in ships, hotels, railroad cars and churches was correct, and thus elicited no reply, because he described these practices as "'discriminations ... made by ... custom' ... and ... tied these effects of the bill to its 'customs' provision").

⁷ 392 U.S. at 463; see also *id.* at 462 n.28 (private abuses proscribed by the bill "to the extent that the described discrimination was the product of custom").

⁸ 392 U.S. at 457, 458, 459, 462, 473. Similarly, Justice Harlan (continued...)

apparently embraces Justice Harlan's intermediate view of § 1.⁹

While § 1, as Justice Harlan acknowledged, reaches beyond state action in the constitutional sense, Justice Harlan's attempt to draw a line short of what he described as "purely private" conduct is unworkable. Justice Harlan's opinion offers three quite distinct definitions of a § 1 custom: practices that existed "from the time of slavery," 392 U.S. at 471, practices "pursuant to 'a prevailing public sentiment,'" 392 U.S. at 463, and practices "which were legitimated by a state or community sanction sufficiently powerful to deserve the name custom." 392 U.S. at 457. Justice Harlan

⁸(...continued)
consistently described conduct outside the scope of § 1, not simply as private, but as "purely private." *Id.* at 461, 463, 465, 473.

⁹ Resp. Rearg. Br. 86, 67, 81, 111.

saw no need to explicate what such definitions might mean in operation, noting only that the plaintiff in Jones had made no allegation of any such custom. 392 U.S. at 476 n.65. But in practice the implementation of Justice Harlan's proposed construction would be plagued by intractable disputes. Virtually any case brought under § 1981 or § 1982 would raise legal and factual issues regarding how widespread the alleged type of discrimination was within the defendant entity, or the local community, and how closely it resembled abuses in the antebellum south.¹⁰

However difficult these issues would

¹⁰ For example, given numerous recent findings of race-based employment discrimination in North Carolina, N.C., Bazemore v. Friday, 478 U.S. 385 (1986), petitioner in the instant case would have a strong argument that such discrimination is customary in that State.

be today, there can be no doubt that, even on Justice Harlan's view, the allegations of the instant complaint would have stated a cause of action had the complaint been filed in 1867 rather than in 1984. The abuses alleged in petitioner's complaint were widespread a century ago, and resembled the abuses inflicted on slaves prior to the Civil War. McLean Credit Union, had it existed in 1867, could not have treated petitioner in the discriminatory manner she now alleges to have occurred. It seems unlikely that Congress intended that an employer might at a later date be permitted to engage in such abuses solely because some other employers in North Carolina have ceased to do so, or because the discriminatory practices once supported by "prevailing public sentiment" in that State might have

become less socially acceptable.

B. THE ACTUAL TERMS OF THE BLACK
CODES UNDERMINE RESPONDENT'S
INTERPRETATION OF SECTION 1981

The linchpin of respondent's construction of § 1 of the 1866 Civil Rights Act is its contention that the exclusive purpose of that provision was to nullify discriminatory provisions of the post-Civil War Black Codes. In fact, however, there were no post-Civil War laws in the south which deprived freedmen of the legal capacity to contract. A review of the actual provisions of the Black Codes not only undermines respondent's interpretation of § 1, but explains the seemingly contradictory tenor of congressional statements.

Some problems, such as testimony by black witnesses in cases in which all parties were white, were indeed the subject of widespread discriminatory

legislation, and in those instances Congress may have been primarily concerned with nullifying such laws.¹¹ In other areas, particularly the right to make contracts and to own property, the Black Codes generally guaranteed blacks the same legal capacity as whites; here the concerns of Congress necessarily lay elsewhere, with the systematic private abuses described in our earlier brief. The seemingly inconsistent legislative explanations of the purpose of § 1 stem, at least in part, from the fact that

¹¹ See Appendix B. Amicus Washington Legal Foundations urges that Congress intended to solve the widespread private mistreatment of blacks by nullifying state laws which prohibited testimony by the black victims of such abuses, asserting that "crimes of violence against ... freedmen went unpunished since blacks could not testify in a court of law." Brief Amicus Curiae of Washington Legal Foundation, at 16. In fact, however, there were by 1866 no such statutory prohibitions in any of the southern states.

different provisions of § 1 addressed distinct types of problems.

It is particularly clear that the provisions of § 1 with regard to owning and leasing property cannot be explained as a measure enacted to overcome discriminatory legislation. In the government's brief in Jones, the Solicitor General correctly observed that none of the Black Codes prohibited the ownership of real property by blacks:

[H]owever discriminatory they were, it does not appear that any of the Black Codes denied the capacity of the Negro to acquire and hold property, real or personal. On the contrary, one standard history, summarizing these laws, observes that they "conferred upon the freedmen fairly extensive privileges [and] gave them the essential rights of citizens to contract, sue and be sued, own and inherit property...." Morrison and Commager, The Growth of the American Republic (1950).... [T]he real problem for the Congress in 1866 was not to nullify local statutes which wholly disabled the Negro with respect to property, or even to clarify his status on this

score.¹²

Five of the Black Codes contained express guarantees of the right of blacks to own, hold or inherit property; the Georgia statute provided, for example, that "persons of color shall have the right ... to purchase, lease, sell, hold and convey, real, and personal property."¹³ Among the state laws adopted in this era only a statute enacted by Mississippi in November of 1865, and not emulated by any other State, placed restrictions on the ability of blacks to lease property.¹⁴

¹² Brief for the United States as Amicus Curiae 30-31, Jones v. Mayer Co., 392 U.S. 490 (1968) (emphasis in original).

¹³ Georgia Laws 1866, p. 239. See also Arkansas Laws 1866-67, p. 99; Florida Const'n. 1865, art. xvi; Florida Laws 1864-65, p. 145; South Carolina Laws 1864-65, p. 271; Texas Const'n. 1866, art. 27; Texas Laws 1866, p. 27.

¹⁴ Mississippi Laws 1865, p. 82 et seq. Legal prohibitions against the (continued...)

Restrictions on the ownership of personal property by freedmen were equally uncommon. Six states adopted express guarantees of the right of blacks to own such property.¹⁵

As the United States also observed in its brief in Jones, none of the Black Codes contained prohibitions forbidding blacks to make or enforce contracts. On the contrary, the general purpose of

¹⁴(...continued)
actual ownership of land by freedmen were apparently limited to identically worded ordinances adopted by two Louisiana parishes in July, 1865. W. Fleming, *Documentary History of Reconstruction* 279 (1906); West Virginia University, *Laws Relating to Freedmen* 31 (1904).

¹⁵ In addition to the authorities cited in note 13, supra, see Mississippi Laws 1865, p. 82. The only exceptions were in South Carolina, which forbade blacks from owning either distilleries or certain types of firearms, and two other states which required blacks, but not whites, to obtain a license in order to possess a lethal weapon. Florida Laws 1864-65, p. 25; Mississippi Laws 1865, p. 82 et seq.; South Carolina Laws 1864-65.

southern laws of this era was to encourage blacks to sign contracts, especially labor contracts. A South Carolina statute adopted in December 1865 provided in part

The statutes and regulations concerning slaves are now inapplicable to persons of color; ... such persons shall have the right ... to make contracts, to enjoy the fruits of their labor; to sue and be sued....¹⁶

Four other states followed South Carolina in enacting express guarantees of the right to make and enforce contracts.¹⁷ Although a freedman generally might not be able to testify in a civil suit between two whites, he was expressly guaranteed the right to testify in any contract case in which he was a party.¹⁸

¹⁶ South Carolina Laws 1864-65, p. 271.

¹⁷ Arkansas Laws 1866-67, p. 99; Georgia Laws 1865-66, p. 239; Tennessee Laws 1865-66, p. 65; Texas Const'n. 1866, art. 27; Texas Laws 1866, p. 27.

¹⁸ See Appendix B.

Although there were a few racially explicit post-Civil War southern laws which affected the contracts of freedmen, it is unlikely that these were the sole problem at which the contract provision of § 1 was directed. First, it is clear that the property provisions of § 1 apply to purely private conduct, as recognized by the dissenting opinion in Runyon. It is unlikely that Congress would have intended, in 1866, 1870 or 1874, to limit the contract provision in § 1 to state action. Placing in the contract provision a state action requirement absent from the property provisions would lead to strange and often unworkable distinctions between contracts for the sale or lease of property and other forms of contract. Private contracts with tenant farmers would be covered by § 1, but private contracts with farm laborers would not.

Private school admissions would be subject to § 1 if students stayed in leased dormitory rooms, but not if they went home at night. It would be illegal for a white blacksmith to refuse on racial grounds to sell a horseshoe to a former slave, but the blacksmith could refuse to nail the shoe to the hoof of the freedmen's horse.

Second, among the eleven former confederate states, only South Carolina adopted legislation limiting the ability of blacks to engage in a trade¹⁹ or regulating the conditions of black employment.²⁰ It would be surprising indeed if Congress, although aware of the dreadful conditions under which millions of freedmen worked all across the south,

¹⁹ South Carolina Laws 1864-65, 274, 299.

²⁰ *Id.* at 295-97.

had decided to address that problem only in South Carolina, and to leave untouched identical working conditions in the ten other former rebel states.

II. THE 1870 VOTING RIGHTS ACT CONFIRMS THAT CONGRESS UNDERSTOOD SECTIONS 16 and 18 OF THAT ACT, LIKE SECTION 1 OF THE 1866 ACT, TO APPLY TO PRIVATE CONDUCT.

Although we believe the scope of § 16 of the 1870 Voting Rights Act is not dispositive here, a close reading of the language and legislative history makes clear that Congress understood § 16 to cover private acts of discrimination. A review of the 1870 Act as a whole reveals that the Forty-first Congress carefully considered which provisions would and would not deal with state laws or activities, and that when Congress had in mind state action it said so expressly. Of the twenty-three sections in that Act, seven expressly refer to state action.

Sections 2 and 3, for example, concern actions "under the authority of the constitution or laws of any State, or the laws of any Territory," and § 22 deals with certain acts "required ... by any law of the United States, or of any State or Territory thereof."²¹ Section 16 of the Act, from which § 1981 derives in part, actually contained two sentences, the second of which was expressly limited to discriminatory state action:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts.... No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from

²¹ 16 Stat. 140, 146. See also 16 Stat. 140-44, § 1 ("any constitution, law, custom, usage or regulation of any State or Territory"), §§ 16, 17 (referring both to acts "under color of custom," and to acts "under law, statute, ordinance, [or] regulation").

any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.²²

The overall structure of the 1870 Act reveals a carefully crafted congressional scheme in which some provisions apply only to state action, some apply only to state or federal action, and some apply without limitation to all persons, public and private.²³ The absence of any express state action requirement in the first sentence of § 16 reflects a considered decision to give to that provision a broader reach than the seven provisions which do contain such

²² 16 Stat. 144 (emphasis added).

²³ Supporters of the 1870 Act insisted that under § 2 of the Fifteenth Amendment Congress could prohibit private as well as government actions interfering with the right of blacks to vote. Cong. Globe, 41st Cong., 2d Sess. 3671 (1870) (Sen. Morton).

restrictions.²⁴

Respondent correctly notes that the particular impetus behind the adoption of § 16 was concern with mistreatment of Chinese immigrants, particularly in California. The tax provision of § 16 was a direct reaction to California statutes imposing special taxes on Chinese immigrants.²⁵ On the other hand, the language in § 16 extending portions of the 1866 Act to aliens, particularly the application to them of "the same right ... to make contracts ... as is enjoyed by white citizens," was not a reaction to any discriminatory state action. When the

²⁴ In addition, § 17 of the 1870 Act, like § 2 of the 1866 Act, imposes criminal sanctions both on government officials and on private parties acting pursuant to custom.

²⁵ See McClain, The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870, 72 Cal. L. Rev. 529 (1984).

1870 Act was adopted no California law limited the right of the Chinese to make contracts, and we have been unable to unearth any suggestion that state or local officials did so.²⁶ Private discrimination against Chinese workers, on the other hand, was rampant. Many private employers refused to hire Chinese immigrants. The ability of the Chinese to find work was further curtailed by organized boycotts of Chinese-made goods, and of employers who hired Chinese employees. These boycotts were so successful that west coast manufacturers placed on boxes of their goods labels assuring customers that the contents "are

²⁶ The plaintiff in Yick Wo v. Hopkins, 118 U.S. 356 (1886), although operating his laundry since 1862, had encountered no problems with local authorities until 1885. 118 U.S. at 358.

made by WHITE MEN."²⁷ "Successful labor agitation ... resulted in the firing of Chinese workers in nearly every urban industry in which they had thrived...."²⁸

Read against this background, Senator Stewart's explanation of § 16 clearly encompasses private as well as governmental abuses:

We are inviting to our shores, or allowing them to come Asiatics. We have got a treaty allowing them to come.... We have pledged the honor of the nation that they may come and shall be protected. For twenty years every obligation of humanity, of justice, and of common decency toward those people has been violated by a certain class of men-- bad men I know; but they are violated in California and on the Pacific coast. While they are here I say it is our duty to protect them. I have incorporated that

²⁷ A. Saxton, *The Indispensable Enemy* 74 (1971) (emphasis in original label).

²⁸ C. Wollenberg, ed., *Ethnic Conflict in California*, 96 (1970). We set forth in Appendix C historical materials dealing with the treatment of Chinese immigrants in this era.

provision in this bill ... so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, ... to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than a man if I did not insist, and I do here insist that that provision shall go on this bill....

Cong. Globe, 41st Cong. 2d Sess. 3658 (1870). Senator Stewart clearly contemplated protecting Chinese immigrants, not only from state officials, but from the whole class of "bad men" who had so long been mistreating them, to deal not merely with abuses occurring under color of law, but with "the whole subject."²⁹

²⁹ Although § 16 was referred to as a measure to assure "equal protection of (continued...)"

III. THE 1874 REVISED STATUTES DID NOT
REDUCE THE SUBSTANTIVE PROTECTIONS
OF THE 1866 CIVIL RIGHTS ACT

Respondent's argument with regard to the 1874 Revised Statutes differs from that originally advanced by the dissenting opinion in RUNYON. The RUNYON dissent insisted that the actual intent of Congress in enacting the codification that includes § 1977 (42 U.S.C. § 1981) was "beside the point," 427 U.S. at 207-08, because the meaning of that provision was controlled by "the Revisers' unambiguous note before" "Congress when §

29 (...continued)
the law," Senator Stewart repeatedly used this phrase to refer to the protection afforded by § 16 itself, not simply as a reference to the failure of state laws to treat blacks, whites, and asians in a non-discriminatory manner. Cong. Globe, 41st Cong., 2d Sess. 3658, 3807, 3808. "Equal protection" was also widely understood in the nineteenth century to refer to the duty of states to protect their residents from abuses by other private citizens. J. tenBroek, Equal Justice Under Law (1951).

1977 was passed" in 1874. 427 U.S. at 205. Respondent now correctly acknowledges that the "note" referred to was not written until 1875. Resp. Rearg. Br. 39. Respondent insists, however, that the legislative history of the 1874 Revised Statutes demonstrates that Congress specifically intended to repeal the protections against discrimination in contracts afforded by § 1 of the 1866 Act (re-enacted as § 18 of the 1870 Voting Rights Act), and to codify in § 1977 only § 16 of the Voting Rights Act.

Respondent's contention faces three insurmountable obstacles. First, the Court has repeatedly insisted that Congress will not be deemed to have repealed prior legislation by mere implication; an intent to repeal will be found only where Congress has expressed it in a clear affirmative manner. E.g.,

Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984). Second, as we noted at length in our previous brief, Congress was repeatedly and expressly reassured that the 1874 Revised Statutes in general, and the civil-rights provisions in particular, were not altering the substantive law as it existed prior to 1874. Pet. Rearg. Br. 10-13. Third, although the wording of § 1977 is the same as that of § 16 of the 1870 Act, the language of § 1977 regarding the right to contract is also identical to this provision of § 1 of the 1866 Act. Congress, having codified in 1874 a guarantee of the right to contract identical to the guarantee in § 1 of the 1866 Act, and the sponsors of the legislation having insisted that the codification entailed no substantive changes in the law, the 1874 Revised

Statutes, like the codification at issue in United States v. Kozminski, "most assuredly was not intended to work a radical change in the law." 101 L.Ed.2d 788, 807 (1988); cf. District of Columbia v. Thompson Co., 346 U.S. 100, 110-18 (1953).³⁰

³⁰ The side notes described by respondent as "the Secretary of State's addition of marginal notations," Resp. Rearg. Br. 37, were not written by the Secretary, but by a private publisher, see 18 Stat. 113, and are thus no more authoritative than a West Publications headnote. The passage in Abbott's National Digest on which respondent relies was not printed until 1884, a decade after the passage of the Revised Code. Abbott's own draft of the revision was rejected by Congress precisely because Abbott and the other commissioners had attempted to make substantive changes in the law. Pet. Rearg. Br. 8-9. Durant's heading for § 1977, "Equal Rights Under The Law," is at best ambiguous, for it could of course refer to the fact that the section was a federal law guaranteeing equal rights.

IV. THE DOCTRINES OF CONGRESSIONAL
RATIFICATION AND STARE DECISIS COMPEL
REAFFIRMATION OF THE DECISIONS IN
RUNYON AND JONES

A. RESPONDENT WOULD NULLIFY STARE
DECISIS

We demonstrated in our previous brief that reaffirmation of Runyon and Jones is required by the established principles of stare decisis: these decisions have benefited, not harmed, the law and society, have not proved unworkable,³¹ have not been effectively overruled by later decisions, and cannot be dismissed as clearly or egregiously ill-reasoned or researched. Respondent does not dispute these specific contentions about the nature and impact of

³¹ It is the overruling of Runyon or Jones that would produce unworkable and illogical results, as discussed in Points I and II above.

Jones and Runyon.³² Respondent offers, instead, a quasi-constitutional argument against the doctrine of statutory stare decisis itself.

In respondent's view, when a prior statutory decision is challenged, the only question that the Court should consider is whether or not it now agrees with that earlier opinion. The Court must on this view overrule any "erroneous decision," because a failure to do so "would be tantamount to legislation by the judicial branch, in violation of separation of powers." Resp. Rearg. Br. 93. Under respondent's rule, every

³² Respondent points out that the Court has overruled precedents in the past. However, as shown in Appendix C to our opening brief and confirmed by recent scholarly analysis, see W. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L. J. 1361, 1369, 1388, 1409 (1988), these decisions were based on special justifications, not simply a conclusion that the precedent was wrongly decided.

mistaken construction of a federal law would be an invasion of the constitutional prerogatives of Congress; the sole responsibility of the Court would be to consider ~~de novo~~ whether its prior decisions were correct. A new interpretation of the law would have to be issued whenever a majority of the Court believed that it had detected an error.

Limiting stare decisis in the way suggested by respondent would, of course, completely nullify the doctrine of stare decisis in the statutory context; after all, no one has suggested that the Court should overrule correctly decided statutory precedents. Contrary to respondent's novel separation of powers theory, the Court has long held that the doctrine of stare decisis has strongest force in the area of statutory

construction.

The rule advocated by respondent necessarily would require an extensive, periodic "reconsideration" process, imposing massive costs on the Court and litigants. If the Court were systematically to revisit close questions of statutory construction -- a task which in respondent's view is essential to assure fidelity to the separation of powers -- it would be able to produce little else.³³

The circumstances of this case illustrate the magnitude of the change in stare decisis law suggested by respondent. Although noting decisions suggesting that stare decisis might not

³³ Most questions resolved by the Court are close, as shown by the large number of dissenting opinions. In the 1986 Term, almost 75% of the cases decided with full opinions included a dissent. Supreme Court 1986 Term, The Statistics, 101 Harv. L. Rev. 362, 364 (1987).

save a prior decision whose erroneous nature was particularly "blatant" or "beyond doubt," Resp. Rearg. Br. 101-02, respondent does not suggest that Jones, Runyon and their progeny meet that standard. To the contrary, Justice Harlan's dissenting opinion in Jones stopped short of asserting that the majority was wrong, stating only that "a contrary conclusion may equally well be drawn." 392 U.S. at 454 (Harlan, J., joined by White, J., dissenting).³⁴ If, on balance, Justice Harlan felt that Jones was mistaken, he regarded the matter as presenting the sort of close case to which stare decisis should be applied. See Monroe v. Pape, 365 U.S. 167, 192

³⁴ Justice Harlan also concluded that the Court's construction "at least is open to serious doubt," 392 U.S. at 450, and that "there is an inherent ambiguity in the term 'right' as used in § 1982," *id.* at 452-53.

(1961) (Harlan, J., concurring and dissenting) (stare decisis applicable unless error in prior decision "appears beyond doubt").

B. CONGRESS APPROVED JONES AND RUNYON

Respondent argues that the extensive legislative history indicating Congress' explicit approval of Jones and its progeny is irrelevant and that no conclusion can be drawn from Congress' failure to overturn these cases. However, this is not a case of unexplained Congressional failure to overturn a Court interpretation. Without repeating the extensive legislative history, two points are worth noting. First, Congress in 1972 was not silent; rather the proponents of Title VII explained in detail why the § 1981 remedy should be retained and the subsequent vote can only be interpreted as agreement with those explanations.

Second, this is not a case of Congressional inaction. In passing the Civil Rights Attorney's Fees Act of 1976, Congress in effect amended § 1981 itself. The Fees Act lists §§ 1981 and 1982 by name.³⁵ The result is the same as if the fees provision had been placed directly into §§ 1981 and 1982. This type of explicit Congressional action, taken after the Jones, Runyon and McDonald³⁶ had been decided and with knowledge of those decisions, is entitled to great weight.

C. CONGRESS AND NOT THE COURT IS
COMPETENT TO ADDRESS THE
INTERACTION OF TITLE VII AND
§ 1981

Respondent and several amici urge that Congress erred when it decided not to make Title VII the exclusive remedy

³⁵ See 42 U.S.C. § 1988 (1982).

³⁶ McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (cited with approval in H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976)).

for employment discrimination. Respondent asserts that opposition to the 1971 Hruska amendment was based on a "gross misapprehension," Resp. Rearg. Br. 122 n. 99, and amicus Washington Legal Foundation complains that the amendment was defeated because of an "erroneous statement"³⁷ on the floor of the Senate. Amicus EEAC characterizes the debates in 1972 as "fairly perfunctory."³⁸

The EEAC also makes a number of specific factual assertions about the manner in which § 1981 and Title VII have interrelated over the last twenty years, including allegations that § 1981 has generally "drive(n) the use of Title VII

³⁷ Brief Amicus Curiae of Washington Legal Foundation at 27.

³⁸ Brief Amicus Curiae of Equal Employment Advisory Council at 18; ~~see~~ also *id.* at 16 (no "reasoned policy decision").

"out of currency" and that complainants "often" use the greater remedies available under § 1981 "to extract from defendants settlements that bear little relationship to the degree of damages suffered." EEAC Br. at 7, 11.³⁹

These arguments have nothing to do with Bunyan, which involved private school admissions and not employment discrimination. And, as we noted in our

39 The EEAC makes further inconsistent factual assertions: that complainants do not file Title VII claims or charges at all, relying instead solely on § 1981, EEAC Br. 7, 22; that complainants do file Title VII charges, but then file premature § 1981 claims in federal court, thus impeding EEOC's investigatory and conciliation function, *id.* at 19-23; that complainants have "common[ly]" filed Title VII charges and deliberately postponed filing a § 1981 claim until the EEOC has finished its work, thus unfairly obtaining the information unearthed by the EEOC investigation, *id.* at 12-13; and that § 1981 is of no importance to complainants because Title VII by itself "insur[es] that the private claimant will receive the most complete relief possible," *id.* at 24.

earlier brief, there are a large number of cases such as Runyon, which, because of their subject matter, could not have been brought under other federal laws. Pet. Rearg. Br. 109-112. Title VII itself applies only to employers with 15 or more employees, thus excluding some 10 million workers and 86 percent of all employers.⁴⁰

Apparently the arguments concerning Title VII are directed toward obtaining the partial repeal of § 1981 that Congress refused to enact in 1972. Such arguments are properly addressed to Congress, not this Court. Moreover, the hypothetical problems asserted by the EEAC were explicitly raised and addressed by Congress when it amended Title VII in 1972. For example, Congress knew that an employee could "completely bypass both the

⁴⁰ T. Eisenberg & S. Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596, 602 (1988).

EEOC and the NLRB and file a complaint in Federal court* under § 1981. 118 Cong. Rec. 3173 (1972).

In addition, the EEOC offers no authority for its assertions regarding what actually has occurred over the years since Jones. A significant body of evidence indicates that these assertions are incorrect. One recent study disclosed that virtually all § 1981 employment complaints also alleged a cause of action under Title VII, indicating that most plaintiffs are not using § 1981 to bypass Title VII.⁴¹ The existence of serious problems with the effectiveness of the EEOC investigation and conciliation

⁴¹ Eisenberg & Schwab, 73 Cornell L. Rev. at 603. This study also showed that § 1981 plaintiffs are successful about as often as Title VII plaintiffs and that the rate of monetary settlements are lower than in Title VII cases, *id.* at 600, thus casting doubt on the assertion that plaintiffs have been able to extract unfair or unreasonable settlements.

process also undermines the argument that Congress intended to force § 1981 plaintiffs into this overburdened system.⁴²

⁴² A recent report indicates that the EEOC found reasonable cause to believe that discrimination occurred in only 38 of the charges it processed in 1986. Office of Program Operations, EEOC, Annual Report F.Y. 1986. While receiving 68,822 charges in FY 1986, the EEOC filed only 526 cases in federal court, of which 99 were subpoena enforcement. *Id.* at 16, 17. A 1987 Government Accounting Office investigation of the Birmingham office of the EEOC showed that 298 of the charges received inadequate investigation and that none of these charges was decided in favor of the charging party. EEOC Birmingham Office Closed Discrimination Charges Without Full Investigation, GAO Report, July, 1987. See Also Staff of the House Comm. on Educ. & Labor, 99th Cong., 2d Sess., Investigation of Civil Rights Enforcement By the Equal Employment Opportunity Commission (Comm. Print 1986), at VII ("greater emphasis on the rapid closure of cases at the expense of quality investigations").

CONCLUSION

For the reasons stated, the Court
should reaffirm the holding in Runyon.

Respectfully submitted,

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APPENDICES

Appendix A

J. James, The Framing of the
Fourteenth Amendment (1956)
(Pp. 52-53)

"By the time that Congress adjourned for the Christmas holidays, people were reading [the Schurz Report] in their newspapers. This long analysis and supporting documents had been sent to Congress along with the short Grant report in response to Sumner's resolution formally asking for it. Radicals had no intention of running the risk that such an important propaganda document might be buried in executive files.

"As was expected, the document created much excitement.... [T]he Chicago Tribune's characterization of the Schurz report as the 'ablest, most

thorough and exhaustive study yet made' is representative of the Radical position [T]he document was published in full in many newspapers, thus reaching and influencing many voters the country over. Copies were printed and circulated by authority of Congress and added to the mass effect of the Schurz document. According to its author, the President came to consider sending him South his greatest mistake up to late January."

Appendix BBlack Code Provisions Regarding
Testimony By Freedmen

Ten of the former confederate states adopted laws expressly permitting blacks to testify in any case in which a black had an interest. Alabama Laws 1866, p. 98 (black can testify if black a party or crime victim); Arkansas Laws 1866-67, p. 98 (no limitations on testimony by blacks); Florida Const'n. 1865, art. xvi, sec. 2; Florida Laws 1865-66, pp. 35-36, 145 (black can testify if black a party or crime victim); Georgia Laws 1865-66, pp. 239-40 (black can testify if black a party or crime victim); Mississippi Laws 1865, p. 82 et seq. (black can testify in open court if black a party or crime victim); North Carolina Laws 1865, p. 102 (black can testify if black a party or

crime victim; not in other cases except with consent of the parties); South Carolina Laws 1864-65, p. 286 (black can testify in any civil or criminal cases "which affects the person or property" of a black); Tennessee Laws 1865-66, p. 24 (no limitations on testimony by blacks); Texas Const'n, 1866, Art. viii, sec. 2, Tex. Laws 1866, p. 27 (blacks shall not be prohibited from testifying, on account of race, in any civil or criminal case "involving the right of, injury to, or crime against" a black); Laws of Virginia 1865-66, p. 89 (black can testify in any case in which a black is a party or a crime victim, or allegedly committed a crime in conjunction with a white).

Appendix CSources Regarding Treatment
Of Chinese in the West

P. Chiu, Chinese Labor in California, 1850-1880, An Economic Study, 12-19 (Chinese workers expelled from mining camps at behest of white miners), 63 (different pay scales for Chinese and white laborers), 87 (systematic replacement of Chinese agricultural workers with whites), 91-92 (labor opposition to employment of Chinese in woolen mills, leading to "[m]ajor reductions" in Chinese employment in the industry), 92 (different pay scales for Chinese and white workers), 95 (clothing manufacturers opposed to hiring Chinese out of fear they would use their skills, once learned, to start their own businesses), 106 (shoe manufacturers opposed for a similar reason to hiring

Chinese), 115 (different pay scales for whites and Chinese in shoe industry), 126 (labor union successful campaign to remove Chinese workers from the cigar manufacturing industry), 129-38 (economic views of unions and others opposed to the employment of Chinese workers)(1967).

I. Cross, A History of the Labor Movement in California 78-80 (boycotts of employers hiring Chinese; 1859 resolution of California People's Protective Union pledged "That every member of the People's Protective Union will hereafter wherever he finds Chinese employed, refuse to patronize such employers; and further that the People's Protective Union recommends every friend of White labor throughout the State to pursue a similar course")(1935).

S. Lyman, Chinese Americans 59-61 (expulsion of Chinese from mining

camps) (1974).

A. Rolle, California: A History 288 (mines refused to hire Chinese) (4th ed. 1963).

A. Saxton, The Indispensable Enemy, Labor and the Anti-Chinese Movement in California 3 (expulsion of Chinese from mining camps), 57 (same), 72-79 (general history of "anti-coolie clubs" in California; successful primary boycotts of Chinese made goods, secondary boycotts of merchants selling such goods; consequent introduction of product labels stating goods were "made by WHITE MEN") (1971).

C. Wollenberg, ed., Ethnic Conflict in California History 72-74 (Chinese workers excluded from mining camps), 94-95 (attacks on Chinese workers in California and Nevada), 96 ("Even though much of California's anti-Chinese

legislation was declared unconstitutional, its intent was realized by successful labor-agitation which resulted in the firing of Chinese workers in nearly every urban industry in which they had thrived ...") (1970).

Daily Alta (San Francisco), February 13, 1867 (white rioters attacked officials of a contractor because it hired Chinese workers).

Daily Alta, February 14, 1867 (riot of previous day condemned as violation "the spirit of [the] treaty" with China).

Daily Alta, February 20, 1867 (plans for a general strike in San Francisco "for ... the driving out of employment of all the Chinese in the city").

Daily Alta, February 21, 1867 (meeting of laborers and others resolved "That we will not patronize any merchant, manufacturer, contractor, capitalist,

lawyer, doctor, brewer, or any person who in anywise employ Chinese labor.*).

Daily Alta, February 22, 1867, p.1, col.1 (the "anti-Chinese labor movement" criticized for refusing to patronize the Chinese "washerman, ... house servant, ... gardener, ... vine dresser, ... cigar maker ... and dirt shoveller [sic]*).

Daily Alta, March 10, 1867 (At meeting of District Anti-Coolie Association "[a] pledge was read to the effect that those present would not buy any goods manufactured by Chinamen").

Sacramento Daily Union, September 18, 1869, p.1, col.4 (describing opposition among working men in Nevada to employment of Chinese).

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THE CHARLES HOUSTON BAR ASSOCIATION;
THE LEGAL AID SOCIETY OF
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QUESTION PRESENTED

"Whether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?"

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I.

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| C. The Decisions In Question Have Not Misconstrued the Meaning Of The Statute As Revealed In The Legislative History | 10 |
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No. 87-107

In the Supreme Court

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THE LEGAL AID SOCIETY OF
SAN FRANCISCO/EMPLOYMENT LAW CENTER
AS AMICI CURIAE SUPPORTING
PETITIONER-BRENDA PATTERSON**

CONSENT FOR FILING

This brief is being submitted with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

Carol L. Bisharat is a Palestinian-American graduate of the Hastings College of the Law, University of California, who has worked on a number of employment discrimination actions for the

San Francisco Lawyers' Committee for Urban Affairs as a law student. Ms. Bisharat is vitally interested in continuing her orientation toward civil rights advocacy, and she expects to continue that advocacy on behalf of minorities in general and Arab-Americans in particular.

Everette M. Cleveland is an Afro-American who was denied the opportunity to purchase jewelry for a Christmas present because the jeweler would not activate the electric lock mechanism to allow Mr. Cleveland to gain entrance because Mr. Cleveland is an Afro-American. Mr. Cleveland has filed a suit alleging, *inter alia*, a violation of section 1981 based on this deprivation of his opportunity to purchase certain items.

Chinese for Affirmative Action is a voluntary, non-profit, membership supported civil rights organization that promotes equal employment, educational and economic opportunities for Asian Americans and other minorities. For the past 19 years, Chinese for Affirmative Action has dedicated itself to the eradication of racism for all people of color in the workplace, public life, educational institutions and in the media. In its efforts to combat racial discrimination, Chinese for Affirmative Action has depended upon this nation's commitment to equal justice through civil rights legislation and litigation to affirm the rights of all individuals in this country regardless of race, creed, sex or national origin.

Equal Rights Advocates, Inc. is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a special interest in eradicating the double burden of race and sex discrimination experienced by women of color. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women of color's ability to gain equality in other aspects of society. This concern has been expressed through Equal Rights Advocates, Inc.'s participation, both as counsel and as *amicus*, in numerous employment discrimination cases.

The Charles Houston Bar Association is the San Francisco, Bay Area branch of the National Bar Association. It represents

over 500 black attorneys, judges and law students in Northern California. Its purposes included achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief that all remedies should be available to eradicate racial discrimination in America.

The Legal Aid Society of San Francisco/Employment Law Center is a private non-profit public interest law firm that specializes in the litigation of employment discrimination cases. Founded in 1916 to represent individuals unable to afford legal counsel, the Legal Aid Society/Employment Law Center is dedicated to the eradication of all forms of employment discrimination. The Legal Aid Society of San Francisco/Employment Law Center was counsel of record in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). It has recently filed *amicus curiae* briefs in this Court in *California Federal Savings and Loan Association v. Guerra*, 107 S.Ct. 683 (1987); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987); *Rotary Club of Duarte v. Board of Directors of Rotary International*, 107 S.Ct. 1940 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); and *Vinson v. Meritor Savings Bank*, 106 S.Ct. 2399 (1986).

SUMMARY OF THE ARGUMENT

The doctrine of *stare decisis* is not a doctrine that should be lightly cast aside. Precedents of this Court have established factors to be considered for determining the appropriateness of overruling or reconsidering earlier decisions. This Court in April of this year has indicated that it desires the parties to address the continuing validity of *Runyon v. McCrary*, 427 U.S. 160 (1976).

A review of the factors this Court has established as guideposts for establishing the propriety for reconsideration or overruling of previous decisions indicates that *Runyon* is well outside the standards embodied in the various factors, and therefore *Runyon* should not be overruled.

Runyon constituted no real departure from recent decisions of this Court in that it was predicated on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Additionally, Congress took no steps to indicate that *Runyon* evidenced a misapprehension of its intent concerning section 1981, and it has had a plethora of opportunities to do so. While the legislative history of this statute may not be crystal clear, there is no real indication that the Court has misconstrued the appropriate statutory meaning in its earlier decisions in *Jones* and *Runyon*. Likewise, a reversal of *Runyon* would certainly frustrate an incredible degree of reliance on the opinion including cases on remand from decisions of this Court only one term ago. Finally, there has been no indication that *Runyon* has been either an ineffective decision or one that is out of step with the times or relevant new information.

Indeed, the overruling of *Runyon* would have the disastrous effect of withdrawing a federal forum where one is still appropriate and necessary. This withdrawal of such a forum would have a devastating impact on litigation of civil rights on behalf of racial minorities covering a variety of issues. Such a rending in the fabric of civil rights law should not be undertaken.

ARGUMENT

INTRODUCTION

On April 25, 1988, this Court issued an order restoring this case, *Brenda Patterson v. McLean Credit Union*, No. 87-107, to its calendar for reargument. Additionally, the Court requested that the parties brief and argue the following question:

Whether or not the interpretation of 42 U.S.C. section 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?

In *Runyon v. McCrary*, 427 U.S. 160 (1976) this Court, relying on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) held that section 1981 prohibits private schools—that were operated commercially and open to the general white public in that they engaged in general advertising to attract their students—from

refusing to accept blacks. The statute in question in both instances, 42 U.S.C. section 1981, provides as follows:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This brief submitted by amici herein only addresses the additional question presented by the Court in its April 25, 1988, Order.

I.

THE NECESSARY HEAVY BURDEN IMPOSED FOR THE COURT TO DISAVOW ITS DECISION IN *RUNYON V. MCCRARY* HAS NOT BEEN MET IN THIS CASE, AND THEREFORE, RECONSIDERATION OF THAT DECISION IS INAPPROPRIATE AND UNWARRANTED.

This Court has stated many times that the doctrine of *stare decisis* is one that should not be lightly cast aside. See, e.g., *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

In fact, the doctrine of *stare decisis* was very recently defined by this Court in *Vasquez v. Hillery*, *supra*, at 266 as being “[t]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligent manner.” The Court went on to discuss what was meant by that definition by stating that the doctrine thereby allows society to rest assured that certain legal principles would be firmly established and not subject to the changing whims of personal or popular trends. *Id.* Thus the Court reiterated the fact that legal precedent is controlling in the judicial sphere of this society rather

than people. Principle rather than personnel must be the controlling factor. These statements must be considered within the context of the present case.

In the case presently before the Court, there is nothing in constitutional or statutory jurisprudence that mandates a departure from this doctrine of *stare decisis*. Indeed, the new issue that has been placed in this case, *sua sponte*, by this Court is one that in no way fits the traditional standards that this Court has fashioned for the overruling of decisions.

In *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 695-701 (1978), this Court articulated four factors to be considered for determining whether decisions should be overruled or reconsidered. The factors discussed in *Monell* are as follows: whether the decision constituted a departure from prior decisions, whether overruling these decisions would be inconsistent with more recent expressions of congressional intent, whether overruling these decisions would frustrate legitimate reliance on these holdings, and whether the decisions in question misconstrued the meaning of the statute as revealed in the legislative history. As will be shown below, a careful analysis of these factors compels the determination that reconsideration and overruling of *Runyon* is inappropriate and unwarranted. Additionally, other considerations often considered by the Court also mandate that *Runyon v. McCrary* not be overruled.

A. The Decision In *Runyon v. McCrary* Did Not Constitute A Departure From Recent Decisions Of This Court.

Runyon was predicated on this Court's earlier opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). While it might be argued that the outcome in *Jones* was incorrect at the time, it clearly had not been reconsidered at the time of the Court's consideration of *Runyon*, some eight years later. *Amici* herein are aware of the dissents in both cases, but this Court had before it full presentations of all issues. Thus, there was nothing in *Jones* or *Runyon* that would allow one to opine that the decision in either case was a casual or incidental holding. It is also important to note that *Jones* dealt with a statute that had lain dormant for over 100 years so that there had been no recent cases construing the

statute. Earlier precedents were distinguished rather than overruled, and therefore it certainly cannot be said that there was a long line of recent precedent that allowed for straying.

Similarly, *Jones* was decided some eight years before *Runyon*, and the decision in *Jones* was made in a period that was verdant with civil rights cases. Thus, there was enormous opportunity to reject this consideration. Indeed, the situation was such that *Jones* could have been reconsidered virtually at any time, but instead it became a bedrock of civil rights law through the decision in *Runyon*.

B. Congress Has Not Seen Fit To Change Or To Challenge This Court's Interpretation of 42 U.S.C. Section 1981 In *Runyon* And Therefore Any Rehearing Of The Issue Is Unwarranted.

Considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change the Court's interpretation of its legislation. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1971); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) The decision of *Runyon v. McCrary*, *supra*, was decided over twelve years ago, and there has been no effort on the part of Congress to reverse the Court's determination in that action. Compare the Congressional action leading to the adoption of Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, legislatively overruling *Grove City College v. Bell*, 465 U.S. 555 (1984).

In an area as controversial as the Court's interpretation of the statutory mandates of civil rights statutes, Congress has seen fit to remedy situations where this Court has rendered decisions that Congress felt perverted its intent. See Pregnancy Discrimination Act, Pub. L. No. 95-555, section 1, 92 Stat. 2076; 42 U.S.C. section 2000e-(k) passed in response to the Court's narrow interpretation of Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). See generally, H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 6, reprinted in *U.S. Code, Cong. & Admin. News* 4749, 4751

(1978). See also 42 U.S.C. Section 1973, overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

There has been no similar movement to alter the Court's determination in *Runyon*. Thus, one must be left with the impression that the Court's opinion in *Runyon* comported with Congressional interpretation of the reach of the statute. "The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction. For in such cases Congress may cure any error made by the courts". *Cottrell v. Commissioner of Internal Revenue*, 628 F.2d 1127, 1131 (8th Cir. 1980).

Thus, had Congress made the determination that the Court was wrong in *Runyon*, it must have been expected to have done something to correct the Court's erring ways. Congressional inaction in response to a decision must be taken as an indication "that the interpretation of the Act then accepted has legislative approval." *United States v. Eglin J.L.E. Ry. Co.*, 298 U.S. 492, 500 (1936).

This is especially true in a situation where the Court's decisions are in a controversial area and are rendered in a period of controversy. The statutes involved in these two cases are hardly in an obscure or arcane area of federal law. Furthermore, *Jones* was decided in the 1960s when the civil rights revolution was in its heyday. A look at the circumstances surrounding Congressional silence clearly evidences that Congress has knowingly embraced this Court's interpretation of the statutes involved. And in such circumstances, the doctrine of *stare decisis* has special force. *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 1928-29 (1986); *Patsy v. Board of Regents*, 457 U.S. 496, 508-12 (1982).

Congress has clearly understood section 1981 to ban racial discrimination by private individuals. Congress considered amendments to Title VII of the Civil Rights Act of 1964 in 1971 and 1972. An amendment was offered during its consideration of that statute that would make Title VII the exclusive remedy for employment discrimination. This proposal was rejected both in committee and on the floor of the Senate. Senator Williams who

was the floor manager of the bill for the Senate stated the following in objecting to that proposal:

It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts [including the Civil Rights Act of 1866] protect fundamental constitutional guarantees. In any case, the courts have specially held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

118 Cong. Rec. 3371, 3372 (1972); accord S. Rep. 92-415, 92nd Cong., 1st Sess., at 24 (1971) (Existing civil rights statutes will not be undercut by according to the Equal Employment Opportunity Commission enforcement powers). See also, H.R. Rep. No. 92-238, p. 19 (1971).

An additional indication that there has been an acceptance by Congress of the propriety of this Court's decision in *Runyon* is evidenced by the inclusion of section 1981 as one of the statutes under which prevailing plaintiffs could receive attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. section 1988. That legislation was in response to this Court's decision in *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). When Congress enacted the Civil Rights Attorneys' Fees Award Act of 1976, it specifically set out certain types of cases brought under section 1981 that would support fee awards under the statute. The legislative history cited to *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) and *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973) as two such cases.¹ See H.R. Rep. 94-1558, at 3-4; S. Rep. 94-1011, at 3-4, reprinted in 1976 U.S. Code, Cong. & Admin. News 5908, 5910.

¹ *Johnson* concerned the issue of whether an action under Title VII against a private employer would toll the running of the statute of limitations for filing an action under section 1981. *Tillman* involved racially motivated refusals to admit blacks to private recreational facilities.

Congress had the perfect opportunity to express any dissatisfaction with the holding in *Runyon* during the furor that surrounded the disputes over the denial of tax exempt status to private schools that were segregated on the basis of race. See *Bob Jones University v. United States*, 461 U.S. 574 (1982). This period would have certainly produced an indication from Congress that this Court's determination in *Runyon* was incorrect had Congress had any such concerns. However, nothing was forthcoming from Congress which certainly must be read as ratification of this Court's decision in *Runyon*.

C. The Decisions In Question Have Not Misconstrued The Meaning Of The Statute As Revealed In The Legislative History.

Reconstructing legislative history is often a doubtful task even when dealing with recent legislation. See *Piper v. Chris-Craft Industry*, 430 U.S. 1, 26 (1972). It is beyond cavil that such a task is even more difficult in the search for the meaning of the legislature for a statute over one hundred years old. Relating this component of the factors to consider with regard to overruling cases, it seems clear that where there has been recent Congressional activity in the area the doctrine of *stare decisis* has special force. See *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501, 502. It is respectfully suggested that in the present case, as in *Patsy*, the possible alteration of the impact of an important piece of Civil Rights legislation would "usurp policy judgments that the national legislature has reserved for itself." *Id.* at 508.

D. Overruling *Runyon* Would Frustrate The Considerable Legitimate Reliance On *Runyon*.

In a virtual unbroken line of cases since *Jones*, this Court has determined that sections 1981 and 1982 addressed racially discriminatory conduct by private parties or entities. In two cases that followed *Jones*, this Court determined that section 1981 encompassed private discriminatory actions.

In *Tillman v. Wheaton-Haven Recreation Ass'n*, *supra*, this Court held that the statute would be violated by the denial of visitors to a private swim club because of their race. The Court in that case determined that the operative language of both sections

1981 and 1982 was traceable to the first section of the Civil Rights Act of 1866, and therefore, there was no reason to construe them differently insofar as their applicability to private acts of discrimination. *Id.* at 439-40.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), this Court considered the application of section 1981 to private discrimination in employment. After noting that there had been a plethora of circuit court decisions holding that section 1981 afforded a federal remedy against racial discrimination in private employment, the Court determined that section 1981 provides a remedy against employment discrimination on the basis of race that is independent of Title VII. *Id.* at 459, n.6.

One year later in *McDonald v. Santa Fe Trails Transportation Co.*, 427 U.S. 273 (1976), the Court determined that whites were covered by section 1981 in private employment situations. Next, in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), this Court again sanctioned the application of section 1981 to claims of private employment discrimination on the basis of race while reaffirming the decision in *Runyon*. *Id.* at 390, n.17.

As recently as last term, this Court determined, without discussion, that section 1981 applied to instances of private racial discrimination in employment. In *Goodman v. Lukens Steel Co.*, 482 U.S. ___, 107 S.Ct. 2617 (1987), the Court determined the appropriate statute of limitations for a section 1981 cause of action against a private employer. In *St. Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022 (1987), the Court determined that the statute provided protection to Arabs in instances in which they had been exposed to racial discrimination by a private college.

Any cursory check of Shepard's or the data bases of Lexis or Westlaw will disclose the incredible degree to which the lower courts have relied on this Court's opinions as to the impact of section 1981 in their work and implicitly the work of the litigants before these courts. *Stare decisis* protects such settled expectations. *Vasquez v. Hillery*, *supra*.

E. There Has Been No Indication That *Runyon v. McCrary* Has Been Ineffective.

Additionally, there has been no indication that *Runyon v. McCrary* has been an ineffective or troubling decision. Indeed, no such argument was made in the case at bar; rather the issue that was first brought to this Court was whether section 1981 would be extended to cover a situation involving allegations of racial harassment in employment.² The opinion of the Fourth Circuit in this case evidenced no dissatisfaction with the proposition that this statute reached private conduct. See *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). Instead, the court determined that 1981 did not reach "terms and conditions of employment" by finding that the reach of section 1981 was not as inclusive as that of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(a).

Furthermore, the use of 1981 as a major weapon in the context of employment discrimination had been accepted since even before this Court's decision in *Johnson v. Railway Express Agency, Inc.*, *supra*. See *Waters v. Wisconsin Steel Works, etc.*, 427 F.2d 476 (7th Cir. 1970). While there was some criticism initially to the Court's seminal decision in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), there has been no widespread concern or opposition to *Runyon*; indeed, as pointed out by Justice Blackmun in *Patterson v. McLean Credit Union*, 56 USLW 3735 (1988) (Blackmun, J. dissenting), over 100 decisions of lower courts have cited to *Runyon* with approval of the relevant language determining that the reach of 1981 includes private action.

Similarly, within the last two terms, this Court has rendered opinions that reinforced the validity of the *Runyon* holding. In

² The questions presented for review were: (1) Does 42 U.S.C. 1981 encompass a claim of racial discrimination in terms and conditions of employment, including claim that petitioner was harassed because of her race? (2) Did district court err in instructing jury that in order for petitioner to prevail on her claims of discrimination in promotion she must prove that she was more qualified than white who received promotion? 56 U.S.L.W. 3204-05 (Oct. 5, 1987) The petition for *Certiorari* was granted on October 5, 1987.

Goodman v. Lukens Steel, 482 U.S. ___, 107 S.Ct. 2617 (1987), this Court determined, *inter alia*, the appropriate statute of limitation for 1981 actions within the context of an action against a privately owned steel company. Likewise in *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022 (1987), this Court determined that 1981 included certain ethnic Caucasians within its broad reach in an action against a private college.³ See also, *General Building Contractors Ass'n Inc. v. Pennsylvania*, 458 U.S. 375 (1982) where this Court determined that in order to prevail in a 1981 action, one had to prove intentional discrimination. This action also involved a situation that attacked racially discriminatory procedures in the context of private conduct.

Thus, it is beyond cavil that there had been no evidencing of a lack of effectiveness or troublesome areas in *Runyon*.

F. There Has Been No Showing That There Is Some Necessity To Bring *Runyon* Into Agreement With Experience Or Newly Ascertained Facts.

There has been no showing that the decision in *Runyon* is at odds with judicial or legislative experience. Indeed, the fact that the statute reaches private conduct has not been recently an area of contention. Rather the litigated issues have been more of the procedural type, *e.g.*, what statute of limitations is appropriate for a section 1981 action, or covered substantive issues concerning questions of liability. As stated previously, there has been no carping as to the reach of section 1981 actions as to private versus state action. Compare with the experience of 42 U.S.C. section 1983, *Monroe v. Pape*, 365 U.S. 167 (1961) with *Monell, supra*.

³ The Court reached a similar holding in *Shaare Tefila Congregation v. John William Cobb*, 481 U.S. ___, 107 S.Ct. 2019 (1987) that Jews and Arabs were among the people considered to be distinct races and hence within the protection of the statute. In the lower court, the action was brought under both 1981 and 1982, but the issue determined by this court only addressed the applicability of 1982. The Court held Jewish congregation members have a cause of action under 42 U.S.C. section 1982 for anti-semitic epithets painted on a synagogue and members' cars by whites.

The focus of many of the decisions was on the types of recoveries available to those who had been subjected to the statutory prohibited behavior. Few, if any, courts questioned the explicit holding of *Runyon*.

II.

THE ERADICATION OF THE REMNANTS OF RACIAL DISCRIMINATION IS STILL A NATIONAL PRIORITY THAT MUST NOT BE STAYED BY RULINGS THAT OVERTURN LONG STANDING AUTHORITY THAT FURTHER THAT PRIORITY.

The Court's Opinion in *Runyon v. McCrary*, *supra*, constitutes part of the very important fabric of this country's laws stamping out racial discrimination. It has long been clear that discrimination is alive and well with regard to the behavior of private individuals. In the seminal case of *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court cited *Runyon* as evidence of a "fundamental national public policy against racial discrimination in education" *Ibid.* at 593-94. That policy was but one of many that this Court has stood firm on to bring about the eradication of racial discrimination root and branch. *Green v. County School Board*, 391 U.S. 430, 438 (1968); *Louisiana v. United States*, 380 U.S. 145, 154 (1967). The Court's firm stands against racial discrimination must be continued.

A. The Possible Message That Would Be Received If *Runyon* Were Overruled Would Be Damaging To The Civil Rights Aspirations Of Minorities.

The Court should be chary of withdrawing a federal forum from litigants in this most important area. Section 1981 was enacted on the force of the Thirteenth Amendment to the Constitution, one of the Civil War Amendments, and these amendments were described by this Court as "[u]nquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Racial discrimination is not something that should be considered odious solely when practiced by governments. The terrible impact of racial discrimination is not softened by the

labelling and knowledge that it has been practiced in a non-governmental arena. Humiliation and racial indignity "[i]s one of the relics of slavery which [42 U.S.C. section 1981] was enacted to eradicate." *Rodgers v. Fisher Body Division, General Motors Corp.*, 575 F. Supp. 12, 16 (W.D. Mich. 1982), citing *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974), and *Jones, supra*.

The withdrawal of a federal forum would be most inauspicious at this particular time. Presently, most Americans believe that racial and ethnic discrimination is a relic of the past and not a significant factor for the inferior conditions in which minorities find themselves. See, e.g., Reeves, *America's Choice: What It Means*, New York Times, Nov. 4, 1984, section 6 (Magazine) at 36, cols. 4-5 (quoting the editor of the *Tennessean*: "I think white Americans have reached a consensus on black America. Look, we've done enough for them. If they can make it fine. If they can't, that's their problem."); Kluegel, "If There Isn't A Problem, You Don't Need A Solution": *The Bases of Contemporary Affirmative Action Attitudes*, 28 AM. BEHAV. SCIENTIST 761, 766 (1985) (White racism can no longer be the explanation for the socioeconomic differences between blacks and whites). [Both references cited in Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harvard Law Review 1331, 1348 n.66 (1988).] By subjecting what had been considered to be binding precedent to reconsideration and overruling it, this Court could be interpreted as sending the signal that it too shares this sentiment. Certainly that would constitute a disastrous setback for the enforcement of civil rights, particularly when one is confronted with the harsh realities of the conditions of minorities in this country.

In 1986, 31 percent of blacks and 27 percent of Hispanics were living in poverty, nearly three times the rate of whites. Unemployment in April, 1988, was 12.2 percent for blacks and 9.3 percent for Hispanics as compared to 4.6 percent for whites. See *One Third of a Nation*, report of Commission on Minority Participation in Education and American Life, reported in Connell, *Minority Gains Lost, Panel Says*, San Francisco Examiner, May 23, 1988 at A-1. Black median income is 57 percent of whites, a

decline of about four percentage points since the early 1970s. Bernstein, *21 Years After the Kerner Report: Three Societies, All Separate*, New York Times, February 29, 1988, B-8 col. 2. Black unemployment averaged 17 percent between 1981 and 1986, and the rate of white unemployment was 7.3 percent. National Urban League, *The State of Black America 1986* at 15 (1986).⁴

The statistics for females of color are equally bleak. Seventy-five percent of employed Hispanic women work in the three lowest paid service occupations. See *Population Bulletin: U.S. Hispanics: Changing the Face of America*, pp. 35-36 (1983). Sixty-one percent of employed Black females were in jobs whose median weekly income place them right at the national poverty level. See Julianne Malveaux, *Lower Wage Black Women: Occupational Descriptions, Strategies for Change*. Paper prepared for the NAACP Legal Defense Fund, Inc. p. 33 (January, 1984).

Statistics speak and courts normally listen particularly in discrimination cases. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962). While these statistics may not have direct relevance to the issue at bar, they do indicate that the battle for equality is not over. Thus, to withdraw as potent a weapon as section 1981 from the civil rights litigators' arsenal would only serve to delay the final victory for racial equality. Furthermore, more than a limited legal message would be articulated by the overruling of *Ranney*. There would also be the signal that racial equality could be viewed as having much less importance than it once had as a national policy.

This would be especially true given the fact that the Court just last term clarified the law as to the extent of the coverage of section 1981 in *Saint Francis College v. Al-Khazraji*, *supra*, and *Shaare Tefila Congregation v. Cobb*, 481 U.S. —, 107 S.Ct.

⁴ Similarly, there has been an increase in actual overt racial hostility recently. See U.S. Commission On Civil Rights, *Intimidation And Violence: Racial and Religious Bigotry In America* (1983). See also Note, *Combating Racial Violence: A Legislative Proposal*, 101 Harvard Law Review 1270 (1988).

2019 (1987).⁵ To provide for the expansion of the remedy under the statute in one term, and then to immediately retract that remedy in the next term certainly does not posit a situation where minorities can feel that their grievances will be seriously considered.⁶

B. Overruling *Ranney* Would Truly Withdraw An Important Forum For The Vindication Of Civil Rights.

Section 1981 is one of the remedial statutes presently available for redressing employment discrimination. This statute and Title VII are the primary statutory vehicles for attacking employment discrimination. By withdrawing section 1981 from the available means of attacking private employment discrimination, the Court would leave certain employees without any redress for employment discrimination based on race. Title VII covers neither establishments with fewer than 15 employees nor employers not involved in interstate commerce. Also, persons who have lost their Title VII claims for procedural reasons would no longer have recourse to section 1981.⁷

Additionally, there would be a reduction in the remedies available to one who has suffered intentional racial discrimination in employment. The great weight of authority holds that one is

⁵ Relying on *Al-Khazraji*, the Court determined that Jews as well as Arabs fell within the protection of section 1982.

⁶ The irony of the situation is grasped when one considers the following language in *Al-Khazraji*: "If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under section 1981." *Id.* at 2028. The impression that would necessarily follow at the heels of that direction is the type that our system really can not afford to absorb.

⁷ There may be a longer statute of limitations period for section 1981 actions, unlike the rather brief limitations period provided for in Title VII (Either 180 or 300 days depending on the particular state) because section 1981 derives its statute of limitations from the appropriate state tort statute of limitations. The appropriate tort statute of limitations is generally longer than those allowed in Title VII actions. See *Goodman v. Lukens Steel Co.*, *supra*.

not entitled to compensatory or punitive damages under Title VII. See, Schlei and Grossman, *Employment Discrimination Law* 1452, n.153, 154 (1983); this type of relief is available under section 1981. *Id.*⁹

1. Reconsideration Of *Runyon* Has Implications Far Beyond Employment Discrimination.

Section 1981 is not limited to areas of employment discrimination. It encompasses other areas of contractual rights.

In the years since *Runyon* was decided courts have applied 42 U.S.C. section 1981 not only to remedy employment discrimination, but to vindicate a panoply of civil rights. It is a sad comment indeed that in the years since 1976 a law enacted in 1866 has still so much vitality in remedying racial discrimination. The following cases lay testimony to just how compelling the need continues to be for a vigorous application of section 1981 in the struggle to provide equal rights for all.

In the battle for equal education, section 1981 has continued to provide an effective weapon. For example, section 1981 was held in several post-*Runyon* cases to prohibit the denial of admission to private schools because of a child's race. See *Riley v. Adirondack Southern School for Girls*, 541 F.2d 1124 (5th Cir. 1976); *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir.), *reh'g denied*, 581 F.2d 472, *cert. denied*, 434 U.S. 1063 (1978) (school's policy on non-integration prohibited by section 1981); *Darensbourg v. Dufrene*, 460 F.Supp. 662 (E.D. La. 1978) (section 1981 bans selection of children in a nursery school based

⁹ Unlike Title VII, Section 1981 does not have any exhaustion requirements and therefore an aggrieved party presently can get into court very quickly. One need not wait for the processing of his or her charge by an agency that has been notoriously slow in processing charges. See *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 359, 369 n.24 (1977). See also Selected Testimony of Chairman of U.S. Equal Employment Opportunity Commission reported in Daily Labor Report D-1-D-3 (March 30, 1988); Age Discrimination Claim Assistance Act, Pub. L. No. 100-283 (extending the statute of limitations in cases not processed by the E.E.O.C. within the limitations period).

on racial criteria); *cf. Gonzalez v. Southern Methodist University*, 536 F.2d 1071 (5th Cir.), *reh'g denied, cert. denied*, 430 U.S. 987 (1977) (plaintiff stated but did not prove a cause of action under section where she alleged that she was denied admission to private law school because she is Mexican-American).

Section 1981 also requires commercial businesses to afford blacks the same treatment it affords whites. Therefore, photographing "suspicious" black customers of a bank as part of a surveillance program instituted at the behest of the police states a cause of action under section 1981. *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978). Similarly, allegations that a hospital refused to award a contract for security services to a company owned and operated by a black man fall within the ambit of section 1981. *Howard Security Services, Inc. v. The Johns Hopkins Hospital*, 516 F.Supp. 508 (D.Md. 1981). Credit companies are also prohibited from refusing credit for racially discriminatory reasons.

Indeed, the scope of section 1981 has been greatly expanded in recent years to bring many others within its protective fold. For example, section 1981 has jealously guarded rights of whites and blacks to associate with one another in private settings. In *Weaver v. Gross*, 605 F.Supp. 210 (D.D.C. 1985), the Court held that a white female bartender at an exclusive club who was allegedly discharged due to her association with a black man has standing to sue under section 1981. Similarly in *Fiedler v. Marumaco Christian Children School*, 631 F.2d 1144 (4th Cir. 1980), the expulsion of a white female student based on her relationship with a black male student was held to be remediable under section 1981.

Racial barriers to equal housing have been increasingly eliminated owing in large part to the vigorous interpretation given section 1981 in *Runyon*. Section 1981 has continued to be effective in outlawing discriminatory refusals to rent to black families. *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977). In one related case, the statute was applied to bar the dismissal of a rental secretary who refused to follow her employer's policy of racial discrimination in showing and renting apartments. *Wilkey v. Pyramid Construction Co.*, 619 F.Supp. 1453 (D.Conn. 1985).

In another case, section 1981 provided a vehicle to challenge an attempt by whites to purchase the home of a white neighbor in order to prevent the sale of the home to a black family. *Sutton v. Bloom*, 710 F.2d 1188 (6th Cir.), cert. denied, 464 U.S. 1973 (1984).

Community facilities have been made more accessible to blacks due to the application of section 1981 to private discrimination. See *Wright v. The Salisbury Club*, 632 F.2d 309 (4th Cir. 1980) (where race is the only selective criteria for membership in housing subdivision country club.)

Indeed, while the "availability of lawful means of vindicating the right to equal treatment has not eradicated discriminatory evils, . . . it does reflect a social commitment to achieving that goal." *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 39 (2nd Cir. 1984). That commitment is as crucial now as it was in 1976 and should not be abandoned by this Court. By overruling *Rumson*, there would be no adequate federal remedy for a large number of circumstances now covered by section 1981.⁹ Minorities would be limited to possible vindication of these

⁹ For example, amicus Cleveland was denied the opportunity to purchase jewelry at a particular jewelry store by the owner's refusal to operate the electrical lock system so that he could enter the store to make a purchase. This practice has received some notoriety in the popular press. See *New Republic*, *The Jeweler's Dilemma*, pp. 18-28 (Nov. 10, 1986). See also *Tillman v. Wheaton-Home Recreation Ass'n*, *supra*.

Ironically even the remaining damage possibilities under section 1981 would be curtailed in employment actions. This Court has determined that the Federal Government is not subject to employment actions under section 1981 in *Brown v. General Services Administration*, 425 U.S. 820 (1976). The clear weight of authority in the lower courts that have addressed the issue have determined that the Eleventh Amendment would protect the states from damage awards including back pay awards. See, *Schlei and Grossman, Employment Discrimination Law* 674 n.16 (1983).

Likewise, recovering a monetary award from the individual would be precluded under the logic of *Brandon v. Holt*, 469 U.S. 464 (1985). And the award of punitive damages against a municipality would be similarly

rights under common law theories or actions under state statutes. It is not the intent of this brief to suggest that state courts are not as able to protect the civil rights of any particular litigant, but in all likelihood, there would not be a comparable body of law approaching that presently established in the federal court system under section 1981. In the area of civil rights law, making a "federal case" out of a lawsuit loses the pejorative connotations. The Federal Courts have, in recent history, been considered to be a fortress against racial discrimination. There is something to be lost by having that fortress subjected to judicial urban renewal.

precluded under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

CONCLUSION

For the reasons stated above, this Court should affirm its holding in *Runyon v. McCrary*.

Respectfully submitted,

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No. 87-107

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Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

v.

Petitioner,

MCLEAN CREDIT UNION,

*Respondent.*On Writ of Certiorari to the
United States Court of Appeals for the Fourth CircuitBRIEF OF 66 MEMBERS OF THE
UNITED STATES SENATE AND 118 MEMBERS OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
AS AMICI CURIAE IN SUPPORT OF PETITIONER †*Of Counsel:*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-107

BRENDA PATTERSON,
v. *Petitioner,*
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Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF 66 MEMBERS OF THE
UNITED STATES SENATE AND 118 MEMBERS OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE¹

Amici curiae are a bipartisan congressional group of 66 members of the United States Senate and 118 members of the United States House of Representatives.² *Amici* have a dual interest in this Court's reconsideration of the interpretation of Section 1981, 42 U.S.C. § 1981, adopted in *Ryan v. McCrory*, 427 U.S. 160 (1976). First, *amici* have an institutional interest in the stability of statutory precedents. That concern is particularly compelling here because this Court is calling into question

¹ Both petitioner and respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

² Individual *amici* are listed beginning on the inside front cover.

the validity of its interpretation of Section 1981, long after the Congress has accepted that interpretation and acted affirmatively to build upon it.

Second, *amici* have a significant interest here because of their role in enacting legislation to eradicate the evils of racial discrimination. Such discrimination, as this Court has recognized, is contrary to "fundamental public policy,"² and its elimination has become, particularly over the past three decades, a paramount national goal. Section 1981, as interpreted by this Court, furthers that policy. It covers a range of conduct that other statutes do not reach, such as the racial discrimination in private school admissions at issue in *Rumpson*.

The interests of *amici* would be adversely affected by the overruling of *Rumpson*. The legislative effort necessary to restore this Court's original interpretation would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.

For these institutional reasons, *amici* urge this Court not to overturn *Rumpson*'s interpretation of Section 1981 as prohibiting intentional racial discrimination in the making and enforcing of private contracts. *Amici* take no position on whether Section 1981 should apply to the particular facts of this case.

SUMMARY OF THE ARGUMENT

This Court's interpretation of Section 1981 in *Rumpson v. McCrery* as prohibiting private discrimination in the making and enforcing of contracts should not be overturned. Section 1981, as interpreted in *Rumpson*, is an essential component of the statutory framework barring discrimination by private parties. It affords a broad-based remedy for intentional racial discrimination that

complements other more specific statutes. Overturning *Rumpson* and forcing the Congress to revisit this area would not only impose significant, unnecessary burdens on the legislative process, but could threaten the repose that the Nation has obtained on the issue of racial discrimination. Adherence to *stare decisis* is essential if the unique interplay between the Congress and the Court that has existed in the development of civil rights law is to be maintained.

The Congress' primary role in lawmaking under the Constitution dictates that any change in the meaning of a statute be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court's interpretations of its statutes. For this reason, *stare decisis*, as this Court has repeatedly recognized, operates with its greatest strength where a statutory interpretation, such as *Rumpson*, is concerned.

There are no special circumstances present here that would justify departing from *stare decisis* and this customary institutional relationship between the Congress and the Court. First, *Rumpson* was not based on an incomplete analysis. Rather, it was the culmination of a series of decisions in which the Court thoroughly analyzed the legislative history of Section 1981 and considered the arguments for and against the applicability of Section 1981 to private conduct. Second, *Rumpson* was not a sport in the law, nor have subsequent legal developments undercut its vitality. Instead, *Rumpson* has been accepted as well-settled law by this Court, by the Executive, and by the Congress. Third, *Rumpson*'s interpretation of Section 1981 is a straightforward rule which has been readily applied by the lower courts and has not proven confusing or unworkable. Fourth, individuals have legitimately relied upon Section 1981's prohibition of private contract-related discrimination since *Rumpson*, and that reliance would be frustrated were *Rumpson* to be overturned. Fifth, and finally, no relevant factual circumstances,

² *Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983).

whether social, economic or otherwise, have changed since *Rumson* was decided.

The case against overturning *Rumson* is particularly strong because the Congress has affirmatively endorsed this Court's construction of Section 1981 as reaching private discrimination. The Court has found congressional approval of a judicial construction of a statute in cases where the Congress has (1) rejected efforts to pass legislation that would have overruled or limited the reach of the judicial interpretation, or (2) failed to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of that interpretation. Both these circumstances are present here.

At two key junctures, the Congress has made its intent plain. In 1972, when considering amendments to Title VII of the Civil Rights Act of 1964, the Congress addressed and rejected proposals to eliminate recourse to Section 1981 in the area of employment discrimination. In 1976, the Congress enacted the Civil Rights Attorney's Fees Awards Act, which extended to prevailing parties the right to recover attorney's fees in actions brought under Section 1981. The Congress recognized, in considering this legislation, that Section 1981 provides remedies for discrimination by private parties. These actions, explicitly predicated on Section 1981 continuing to have the meaning given to it by this Court, give rise to a virtually conclusive presumption that the Congress has approved *Rumson*.

ARGUMENT

In *Rumson v. McCrory*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. The Court has now requested the parties to brief "[w]hether or not th[at] interpretation . . . should be reconsidered." *Amici* urge the Court not to overrule *Rumson*.

I. SECTION 1981, AS INTERPRETED BY THIS COURT, IS AN INTEGRAL COMPONENT OF THIS NATION'S CIVIL RIGHTS LAWS.

Rumson is one of the essential civil rights precedents established by this Court over the past twenty years. In 1968, the Court foreshadowed *Rumson* by holding in *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968), that Section 1982, 42 U.S.C. § 1982, a related statute, prohibits racial discrimination in private property transactions. Then, in 1975, the Court concluded in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), that Section 1981 reaches private discrimination in employment. *Rumson* simply built upon these foundations.

As interpreted in *Rumson*, Section 1981 is an integral component of the statutory framework that the Congress has developed to bar private racial discrimination. Other more detailed statutes afford comprehensive remedies for acts of discrimination by specified private parties, e.g., employers of a certain size, restaurants, and hotels. These statutes often have easier standards of proof and are often enforceable by the Executive Branch.⁴ Section 1981 affords victims of discrimination a complementary, broad-based remedy for many forms of contract-related intentional racial discrimination, including discrimination by parties not covered by other statutes. It is not an exaggeration to say that overturning *Rumson*, and adopting the view that Section 1981 addresses only state statutes and other state actions that disable minorities from making or enforcing contracts, would effectively render Section 1981 a nullity. Under that reading, Section 1981 would bar only conduct that is already prohibited by the Fourteenth Amendment by its own force.

Amici's concern for the viability of *Rumson's* interpretation of Section 1981 is not lessened by the fact that the Congress may legislatively alter a statutory interpreta-

⁴ See, e.g., Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2 et seq.

tion of the Court. Any congressional effort to change a decision of this Court could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute. But with regard to one of the core civil rights statutes, the costs are far greater. To require the Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination. If the Court overturns *Runyon*, intentional racial discrimination that is now illegal could exist for years without remedy, while the Congress debates the scope and details of new legislation.

The experience with this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), is illustrative. The Court concluded in 1984 that the Congress had intended that statutory provisions prohibiting discrimination in certain federally-funded programs be narrowly construed. Despite overwhelming agreement that *Grove City* should be overturned, it took the Congress a "long and troubled"⁴ four years—in significant part because of disagreements over collateral issues—to enact legislation to accomplish that result.⁵ In the mean-

⁴ 134 Cong. Rec. 82744 (daily ed. Mar. 22, 1988) (statement of Sen. Chafee).

⁵ See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). One bill to overturn this Court's decision in *Grove City* was introduced the same day the decision was handed down. 130 Cong. Rec. 3661-62 (1984). Another bill, introduced two months later, 130 Cong. Rec. 84535 (daily ed. Apr. 12, 1984), actually passed in the House of Representatives, but failed in the Senate due to an end-of-session filibuster. 131 Cong. Rec. 2149 (1985) (statement of Sen. Kennedy); S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the next session of the Congress, legislation to overturn *Grove City* was introduced in both the House and Senate. 131 Cong. Rec. 901 (1985) (House); 131 Cong. Rec. 2151 (1985) (Senate). The Senate bill was never reported out of the

time, institutions receiving federal funds were free to discriminate on racial or other grounds as long as they did not discriminate in particular federally-funded programs.⁶

Amici wish to make clear that what is at stake here is not legislative convenience, but the vital interaction that has developed between the Congress and the Court in protecting the Nation against the evils of racial discrimination. The doctrine of *stare decisis* is essential to that interaction.

II. *STARE DECISIS* DICTATES CONTINUED ADHERENCE TO THE INTERPRETATION OF SECTION 1981 ADOPTED BY THIS COURT IN *RUNYON* v. *MCCRARY*.

The orderly functioning of our government requires that the Congress be able to rely on the stability of stat-

Committee on Labor and Human Resources. S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the House, the bill was favorably reported by both the Judiciary and the Education and Labor Committees, H.R. Rep. No. 963, 99th Cong., 2d Sess. Parts 1 and 2 (1986), but was never brought to the full House.

The Civil Rights Restoration Act of 1987 was introduced on February 19, 1987, with 51 senators cosponsoring the bill. 133 Cong. Rec. 82249 (daily ed. Feb. 19, 1987). But it was not until almost a year later that it passed in the Senate, 134 Cong. Rec. 8266 (daily ed. Jan. 28, 1988), and several weeks more before it passed in the House. 134 Cong. Rec. H1097-98 (daily ed. Mar. 2, 1988). The President vetoed the bill, principally because of concerns that it might impinge upon the affairs of religious institutions and small businesses. Message to the Senate on Civil Rights Legislation, 24 Weekly Comp. Pres. Doc. 353 (Mar. 16, 1988). The Congress overrode the veto and thus, more than four years after *Grove City* was decided, overturned that decision. 134 Cong. Rec. 82765 (daily ed. Mar. 22, 1988) (Senate override); 134 Cong. Rec. H1071-72 (daily ed. Mar. 22, 1988) (House override).

⁶ See 134 Cong. Rec. 82731 (daily ed. Mar. 22, 1988) (statement of Sen. Domenici) ("[F]or the past 4 years, while legislation has been drafted and redrafted and hearings have been held, discrimination against individuals on the basis of race, sex, age, and physical handicap has occurred because of the Supreme Court's decision.").

utory interpretations. Once the Congress has enacted a law, and this Court has interpreted it, the Congress relies on the Court to refine that precedent and apply it to specific cases. But the Congress must be able to assume that a construction of a statute, rendered by this Court after full and fair consideration, is fixed so that the Congress can build upon it if it chooses. Without the exceptional vigor of *stare decisis* in the statutory arena, this partnership between the Congress and the Court would break down. If that happened, the Congress would bear a continuing and onerous burden of having to signal its agreement with each of the Court's statutory interpretations, or face unexpected reversal of those interpretations.

The doctrine of *stare decisis* is a venerable principle of judicial decisionmaking which has been recognized by this Court since the earliest days of the Republic.⁸ It has retained its importance because of the fundamental values it protects and promotes. First, it furthers "the stability and predictability required for the ordering of human affairs over the course of time."⁹ Second, it promotes judicial efficiency by ensuring that today's judges need not rehear every past decision, but can instead "lay [their] own course of bricks on the secure foundation of the courses laid by others who [have] gone before [them]."¹⁰ Finally, in the broadest and grandest sense,

⁸ See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807).

⁹ *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). See also *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("[S]tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.").

¹⁰ B. Cardozo, *The Nature of the Judicial Process* 149 (1921). See also *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring); R. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* 72-73 (1961); K. Llewellyn, *The Bramble Bush* 64-65 (1961).

it legitimates our system of the rule of law, and the role of the Supreme Court in that system.¹¹ Justice Harlan summed up these considerations for a unanimous Court 18 years ago:

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.¹²

Thus, in reconsidering any established rule, this Court must give great weight to these considerations. In this case their proper application is clear. *Rumson* should not be overruled.

¹¹ See, e.g., *Vasquez v. Hillery*, 474 U.S. 264, 265-66 (1986) (*Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. at 154 (Stevens, J., concurring) ("Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office."); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749, 752 (1988) ("[S]tare decisis operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society. . . . A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

¹² *Moragne v. State Marine Lines, Inc.*, 338 U.S. 375, 403 (1970).

A. The Institutional Relationship Between the Congress and the Court Makes Application of *Stare Decisis* to a Statutory Interpretation Such As *Rumson v. McCrory* Particularly Appropriate.

Rumson is a statutory rather than a constitutional holding. This Court has repeatedly distinguished between constitutional and statutory cases for purposes of *stare decisis*, and has pronounced itself particularly loath to ignore the doctrine of *stare decisis* where an earlier statutory interpretation is at issue, given that "*stare decisis* has more force in statutory analysis than in constitutional adjudication" ¹³ The Court has adhered to that axiom in practice.

One reason for this distinction is that "in the area of statutory construction . . . Congress is free to change this Court's interpretation of its legislation." ¹⁴ Another

¹³ *Monell v. Department of Social Serv.*, 436 U.S. 658, 695 (1978). See also *id.* at 708 (Powell, J., concurring); *id.* at 714 (Rehnquist, J., dissenting) ("[C]onsiderations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (A "strong presumption of continued validity . . . adheres in the judicial interpretation of a statute."); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation."); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring) ("[C]onsiderations of *stare decisis* are to be given particularly strong weight in the area of statutory construction."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction. . . ."); *Rumson v. McCrory*, 427 U.S. at 175; *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974); *Bops Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting); *Eric R.R. v. Tompkins*, 304 U.S. 64, 77 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

¹⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. at 736. Of course, as the *Grove City* experience illustrates, there are significant costs involved in legislatively overruling a decision of this Court. See *supra* Part I.

reason that "this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing." ¹⁵ is found in "the deference that this Court owes to the primary responsibility of the legislature in the making of laws." ¹⁶ The Congress is vested by Article I of the Constitution with "all legislative powers." The Court properly interprets statutes enacted by the Congress because interpretation is required to decide cases brought before it. However, once rendered, a statutory interpretation becomes "an integral part of the statute." ¹⁷ While the Congress is free to overturn a statutory precedent for any reason it sees fit, the judicial branch is not similarly free to reverse precedents whenever judges have second thoughts. In Justice Black's words:

Altering the important provisions of a statute is a legislative function. . . . Having given our view on the meaning of a statute, [the Court's] task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature. ¹⁸

¹⁵ *Monell v. Department of Social Serv.*, 436 U.S. at 718 (Rehnquist, J., dissenting).

¹⁶ *Bops Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 257 (Black, J., dissenting).

¹⁷ *Gulf, Colorado & Santa Fe Ry.*, 215 U.S. 133, 136 (1927).

¹⁸ *Bops Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 258 (Black, J., dissenting). While the majority in *Bops Markets* overturned a statutory interpretation, it did not disagree with the principle articulated by Justice Black, but differed only on the application of that principle to the facts of the case. See also *Commissioner v. Fink*, 187 S. Ct. 2729, 2737 (1967) (Stevens, J., dissenting) ("The relationship between the courts or agencies, on the one hand, and Congress, on the other, is a dynamic one. In the process of legislating it is inevitable that Congress will leave open spaces in the law that the courts are implicitly authorized to fill. The judicial process of construing statutes must therefore include an exercise of lawmaking power that has been delegated to the courts by Congress. But after the gap has been filled, regardless of whether it is filled exactly as Congress might have

B. There Are No Special Circumstances in This Case That Justify Overruling *Rançon v. McCrory*.

Although the Court does, from time to time, overrule earlier decisions, the mere fact that the Court might have reached a different result had it decided the earlier case has never been thought a sufficient justification for doing so. Instead, "[a]ny departure from the doctrine of *stare decisis* demands special justification."¹⁰ And where a prior statutory precedent is at issue, "[o]nly the most compelling circumstances can justify this Court's abandonment of such firmly established . . . precedents."¹¹ In this case, the factors which the Court heretofore has considered relevant in determining whether such "compelling circumstances" exist do not support overruling *Rançon*.

1. The Interpretation of Section 1981 Adopted in *Rançon v. McCrory* Was Not Based Upon an Incomplete Analysis.

In determining whether to overrule a prior decision, the Court has sometimes taken into account whether the decision fully considered competing arguments.¹² Here, consideration of this factor clearly counsels in favor of leaving *Rançon* undisturbed.

intended or hoped, the purpose of the delegation has been achieved and the responsibility for making any future change should rest on the shoulders of Congress").

¹⁰ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

¹¹ *Minell v. Department of Social Serv.*, 436 U.S. at 715 (Rehnquist, J., dissenting). See also *Vasquez v. Hillery*, 474 U.S. at 246 ("[T]he careful observer will discover that any departure from the straight path of *stare decisis* in our past have occurred for articulable reasons. . . . [E]very successful precedent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.").

¹² See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984) (overruling previous decisions interpreting Section 1 of the Sherman Act to reach "intra-enterprise" conspiracies: "[W]hile this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule. . . .").

Rançon's interpretation of Section 1981 as prohibiting private contract-related racial discrimination in education was not an aberration. It evolved from the Court's earlier decisions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In both *Rançon* and these prior decisions, the Court fully and carefully considered the competing arguments.

Jones held that Section 1982 reaches private racial discrimination in property transactions. The Court analyzed in detail the Reconstruction-era legislative history, which relates to both Sections 1981 and 1982, to determine whether the statute was intended to reach private, as well as governmental, conduct. 392 U.S. at 422-37. The Court concluded that the Congress "plainly meant to secure" the right to purchase or lease property "against interference from any source whatever, whether governmental or private." *Id.* at 424.¹³ In *Tillman*, the Court recognized that Section 1981 reached the conduct of a private association that operated a neighborhood swimming pool. In making that determination, the Court again recognized the interrelated legislative histories of Sections 1981 and 1982. The Court concluded that there was "no reason to construe these sections differently" under the facts before it. 410 U.S. at 449. Two years after *Tillman*, the Court unanimously stated in *Johnson* that "it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 459-60.¹⁴

¹³ This Court has subsequently affirmed *Jones* on numerous occasions. See, e.g., *Shawee Tefila Congregation v. Cobb*, 107 S. Ct. 2019, 2021 (1987); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. at 433; *Bullman v. Little Hunting Park, Inc.*, 106 U.S. 229, 235-36 (1989).

¹⁴ The *Rançon* Court described this statement as "the square holding" and the "unequivocal[]" holding of *Johnson*. 427 U.S. at 179 n.8, 172. And the United States characterized the statement

In 1976, the *Rançon* Court, citing *Jones*, *Tillman*, and *Johnson*, concluded that "[i]t is now well established that . . . [Section] 1981 prohibits racial discrimination in the making and enforcement of private contracts." 427 U.S. at 168. Nevertheless, the Court again carefully reviewed the legislative history of Section 1981. *Id.* at 168-71, 174-75. The Court considered and rejected, as "wholly inconsistent" with its earlier precedents, the argument that Section 1981 reached only state-sponsored discrimination. *Id.* at 173. The Court also rejected the argument that Section 1981 prohibits only legal rules that disable minorities from making and enforcing contracts. See *id.* at 194 (White, J., dissenting).

Indeed, the Court has so fully and completely considered the Reconstruction-era legislative history of Section 1981 that, following its decision in *Rançon*, the Court has merely incorporated the prior analyses by reference, rather than "repeat the narrative again."¹⁴

Accordingly, *Rançon* cannot be said to be based upon an incomplete analysis or less than full consideration of competing arguments.

2. The Interpretation of Section 1981 Adopted in *Rançon v. McCrory* Has Not Been Undercut by Subsequent Legal Developments.

Another factor the Court has sometimes considered in determining whether to overrule an earlier decision is whether the reasoning of the earlier decision has been undercut by subsequent legal developments. In such cases, the Court is often making explicit what has been implicit

as the "ratio decidendi" of *Johnson*. Brief for the United States as Amicus Curiae at 14, *Rançon v. McCrory*, 427 U.S. 168 (1976) (No. 75-42). *Johnson* was a Section 1981 action against a private defendant. The actual issue before the Court concerned the applicable statute of limitations. The Court would not have reached that issue if Section 1981 did not provide a cause of action for acts of racial discrimination by private parties.

¹⁴ *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982).

for some time. The overruling simply culminates a long process of erosion.¹⁵ Similarly, the Court has sometimes revisited a decision found to be wholly inconsistent with prior decisions or inconsistent with a parallel line of authority.¹⁶

Rançon's reasoning and holding have not been undercut by subsequent legal developments. No decision rendered by this Court has questioned the continuing vitality of the interpretation of Section 1981 adopted there. On the contrary, this Court has repeatedly and without exception treated *Rançon* as well-settled law.¹⁷ The Executive Branch has also consistently supported the interpretation of Section 1981 adopted in *Rançon*,¹⁸ and no de-

¹⁵ See, e.g., *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972) ("Later cases from this Court have repudiated the reasoning advanced in support of the result reached in [the earlier decision]."); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 338 ("[S]ubsequent events have undermined [the] continuing validity [of the earlier decision]."). See also *Puerto Rico v. Branstetter*, 187 S. Ct. 2802, 2809 (1987) ("[The earlier decision] is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.").

¹⁶ See, e.g., *Minnell v. Department of Social Serv.*, 436 U.S. at 635 (justifying overruling *Minnell v. Page*, 345 U.S. 147 (1961)), in part on ground that *Minnell* "was a departure from prior practice" and inconsistent with a subsequent line of cases "holding school boards liable in § 1981 actions. . . .").

¹⁷ See, e.g., *Goodman v. Lukens Steel Co.*, 187 S. Ct. 2417, 2420 (1987); *Saint Francis College v. Al-Khazraji*, 187 S. Ct. 2902, 2906 (1987); *Wickson v. King & Spalding*, 447 U.S. 69, 78 (1984); *Bob Jones Univ. v. United States*, 461 U.S. at 396; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 384; *City of Memphis v. Greene*, 451 U.S. 100, 125 n.28 (1981); *Great Am. Fed. Sec. & Loan Ass'n v. Newberg*, 442 U.S. 586, 577 (1979); *Cash v. Hudson*, 429 U.S. 163 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976).

¹⁸ See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 18, *Patterson v. McLean Credit Union* (No. 87-187); Brief for the United States at 38, *Goldsboro Christian*

velopments in the Congress have eroded the reasoning of *Rançon*. Indeed, as discussed in Part III, the Congress has convincingly demonstrated that it fully agrees with *Rançon's* interpretation of Section 1981.

Nor is *Rançon* a sport in the law. It is neither out of step with prior decisions, as discussed above, nor inconsistent with any parallel line of authority in this Court.

3. The Interpretation of Section 1981 Adopted in *Rançon v. McCrary* Has Not Proved Confusing or Unworkable in Practice.

A third factor the Court has considered is whether the earlier case has caused confusion or created practical difficulties for the lower courts in applying the law.²⁰ Clearly *Rançon* has not.

Rançon straightforwardly held that Section 1981 reaches private parties who intentionally discriminate on

Schultz, Inc. v. United States, reported as *Bob Jones Univ. v. United States*, 441 U.S. 814 (1983) (No. 81-1); Brief for the Secretary of Commerce at 20 n.8, *Fulbrook v. Klotzwick*, 448 U.S. 148 (1980) (No. 81-1007); Brief for the United States as Amicus Curiae at 7, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1974) (No. 75-240); Brief for the United States as Amicus Curiae at 13, *Rançon v. McCrary*, 427 U.S. 149 (1974) (No. 75-40).

²⁰ See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965) (overruling earlier statutory decision that "in practice unworkable . . . lower courts have . . . sought to avoid dealing with its application or have interpreted it with uncertainty"). See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1974)), in part because "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' had proved 'unworkable in practice'"; *Gulfstream Aerospace Corp. v. Mayhem Corp.*, 128 S. Ct. 1181, 1185-81 (1988) ("A half century's experience has persuaded us . . . that the rule is . . . unworkable and arbitrary in practice. . . . [T]he gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation.").

the basis of race in the making and enforcement of contracts. Since there has never been any question that Section 1981 also reaches state-sponsored racial discrimination, *Rançon* simply made clear that Section 1981 applies across the board without regard to the identity or position of the actor. Lower courts, following *Rançon*, have not found this general principle to be confusing or unworkable.²¹ Of course, this Court's guidance may be necessary in fine-tuning that principle and applying it to specific cases such as this one. But that ongoing process is not a reason to overrule a general principle already established.

4. Overruling the Interpretation of Section 1981 Adopted in *Rançon v. McCrary* Would Frustrate Legitimate Reliance Interests.

Another factor this Court has considered is whether "individuals may have arranged their affairs in reliance on the expected stability of the decision."²² Where there has been no legitimate reliance on the decision, the Court may feel less bound by *stare decisis*.

In *Monell v. Department of Social Services*, 436 U.S. 658, 700 (1978), for example, the Court noted that its earlier decision holding municipalities immune from suit under Section 1983, 42 U.S.C. § 1983, could not be legitimately relied upon by municipalities because violations

²¹ See, e.g., *Wright v. Salisbury Club, Ltd.*, 632 F.2d 319, 322 (4th Cir. 1980); *Monaghan v. Safeway Stores, Inc.*, 583 F.2d 908 (10th Cir. 1978); *Hall v. Pennsylvania State Police*, 579 F.2d 98, 99 (3d Cir. 1978); *Brown v. Duke Christian Schools, Inc.*, 534 F.2d 319, 322 (5th Cir. 1977), cert. denied, 434 U.S. 1002 (1978); *Nieto v. UAW, Local 385*, 672 F. Supp. 987, 988-89 (E.D. Mich. 1987); *Miller v. Hall's Birmingham Wholesale Florist*, 640 F. Supp. 948 (N.D. Ala. 1986); *Mays v. Chrysler Corp.*, 483 F. Supp. 1185, 1190 (E.D. Mo.), aff'd, 615 F.2d 1363 (8th Cir. 1979); *Hollander v. Sears, Roebuck & Co.*, 450 F. Supp. 495, 499-500 (D. Conn. 1978).

²² *Monell v. Department of Social Serv.*, 436 U.S. at 700 (quoting *Monroe v. Pape*, 365 U.S. at 323-22 (Frankfurter, J., dissenting)).

of constitutional rights are "completely wrong" and public bodies cannot arrange their affairs "on an assumption that they can violate constitutional rights indefinitely" In contrast, *Ranpo* is a decision which protects against violations of the statute and provides relief for them, rather than shielding violators, and reliance on it is unquestionably legitimate.

Clearly, individuals "have arranged their affairs in reliance on the expected stability of" *Ranpo*'s ruling that Section 1981 prohibits private racial discrimination in the making and enforcing of contracts. For example, parents have made arrangements to place their children in private schools with the legitimate expectation that Section 1981 ensures that those schools are not now segregated, and will not be segregated in the future. The Congress has also legitimately relied on *Ranpo* by enacting legislation predicated on Section 1981 continuing to have the meaning given to it in *Ranpo*. See *infra* Part III.

If *Ranpo* is overruled, this reliance—by individuals as well as by the Congress—would be frustrated at great social and emotional cost. The very purpose of Section 1981, like all other civil rights laws, is to change behavior and, therefore, expectations. The progress wrought by these laws is considerable and undeniable. The stability of decisions in this area is vital to the success of the Nation's effort to eliminate racial discrimination. Those individuals whose rights are protected by anti-discrimination statutes should be able to rely on settled precedent in arranging their affairs, and those whose conduct is governed by such laws should not be led to expect that they can escape their legal obligations by reversals in statutory interpretations.⁶⁰

⁶⁰ See *Perry v. Board of Regents*, 417 U.S. 696, 801 n.3 (1973) (refusing to overrule prior cases that had refused to read exhaustion of administrative remedies requirements into Section 1981, in part because "[o]verruling these decisions might injure those § 1981 plaintiffs who had brought or waived their state administrative remedies in reliance on these decisions").

3. There Has Been No Relevant Change in Social, Economic or Other Factual Circumstances Since *Ranpo* v. McCrary.

Finally, in the constitutional context, the Court has sometimes overruled an earlier decision on the ground that some underlying factual circumstance—social, economic, or otherwise—has changed.⁶¹ In Justice Stewart's words, "[a] substantial departure from precedent can . . . be justified . . . in the light of an altered historic environment."⁶² So far as *owici* are aware, this factor has rarely, if ever, been applied in the statutory context and, in any event, does not apply to *Ranpo*.

No relevant social or economic circumstance has changed since 1976. If there was a "factual circumstance" that influenced the Court's interpretation of Section 1981 in *Ranpo*, it was the recognition that "[t]he policy of the Nation . . . in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society." 427 U.S. at 191 (Stevens, J., concurring). That policy has not changed. Today the nation remains committed to "the fundamental policy of eliminating racial discrimination."⁶³

. . . .

In sum, the factors this Court considers in determining whether to apply *stare decisis* overwhelmingly counsel that *Ranpo* not be overruled. As the Court stated

⁶¹ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (overruling decision that had upheld the systematic exclusion of women from jury service because "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed"); *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 527 (1896), in part because the insidious psychological effects of segregation on school children "is amply supported by modern authority").

⁶² *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 634-35 (1974) (Stewart, J., dissenting).

⁶³ *Bob Jones Univ. v. United States*, 461 U.S. at 395.

more than 40 years ago in refusing to overrule the interpretation of another Reconstruction-era civil rights statute adopted in *United States v. Classic*, 313 U.S. 299 (1941):

The construction given § 20 [18 U.S.C. § 242] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have a situation here comparable to *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us.

Screws v. United States, 325 U.S. 91, 112-13 (1945).

The reasoning in *Screws* applies fully here. It is made more compelling by the fact, as amici show below, that this Court's interpretation of Section 1981 has been affirmatively approved by the Congress.

III. STARE DECISIS APPLIES WITH SPECIAL FORCE BECAUSE THE CONGRESS HAS AFFIRMATIVELY ENDORSED THIS COURT'S INTERPRETATION OF SECTION 1981.

This Court has recognized that the doctrine of *stare decisis* has particular force where the Congress has taken subsequent legislative action consistent with the Court's

interpretation of a statute.²⁶ Thus, where the Congress has reenacted a statute, this Court's prior construction of the statute is presumed to have been adopted by the Congress.²⁷ Likewise, the Court has found congressional approval of a judicial interpretation of a statute in the Congress' rejection of legislation that would have overruled or limited the reach of the judicial interpretation.²⁸

²⁶ See, e.g., *Petry v. Board of Regents*, 437 U.S. at 581 ("whether overruling [prior] decisions would be inconsistent with more recent expressions of congressional intent" is "particularly relevant" in deciding "whether prior decisions should be overruled or reconsidered"); *Monell v. Department of Social Serv.*, 436 U.S. at 696-99.

²⁷ See, e.g., *Douglas v. Sencourt Products, Inc.*, 431 U.S. 265, 279 (1977) (where the Congress has reenacted a statute "in substantially the same form," the Court "can safely assume that Congress was aware of the [interpretation given the statute by the Court and] . . . that Congress has ratified th[at] statutory interpretation. . . ."); *Skapiro v. United States*, 335 U.S. 1, 16 (1948) ("[T]here is a presumption that Congress, in reenacting the [statute] . . . was aware of the settled judicial construction of the statute. In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'") (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)).

²⁸ See, e.g., *Local 28 of the Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3047 (1986) ("Congress was aware that both the Executive and Judicial Branches had used [race-conscious affirmative action] as a remedy under [Title VII], and rejected amendments that would have barred such remedies. . . . [This] confirms Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII") (opinion of Brennan, J.); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) ("[L]egislation [that would have overturned judicial interpretation of statute] has been introduced repeatedly in Congress but none has ever been enacted. . . . We continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."); *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (refusing to override interpretation of Bankruptcy Act adopted in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), because section of Act interpreted "was left unchanged despite the fact that in every Congress since *Embassy Restaurant*

as well as in the Congress' failure to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of the interpretation.²⁹

Here, the Congress has both declined to enact legislation that would have effectively repealed Section 1981 as it relates to employment discrimination, and left *Ran-son* untouched in the course of enacting related legis-

bills have been introduced to overrule or modify the result reached in that case").

²⁹ See, e.g., *Monsieur S.W. Ry. v. Morpan*, 56 U.S.L.W. 4494, 4496 (June 6, 1988) (where the Congress amended the Federal Employers' Liability Act several times, but never attempted to amend it to provide for prejudgment interest, "Congress at least acquiesces in, and apparently affirms" the judicial interpretation that prejudgment interest is not available under the Act) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 708 (1979)); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 419 ("Particularly because the legislative history reveals clear congressional awareness of [an earlier interpretation of the statute by the Court] . . . the fact that Congress specifically addressed this area and left [the earlier decision] undisturbed lends powerful support to [its] continued viability."); *Patey v. Board of Regents*, 437 U.S. at 508-09 (Court declined to overturn its earlier decisions holding that exhaustion of administrative remedies was not mandated under Section 1981, in large part because "the Congress, in a subsequent enactment of a related statute, had 'clearly expressed its belief' that 'the no-exhaustion rule should be left standing.'"); *Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *Herman & MacLean v. Huddleston*, 439 U.S. 375, 383-86 (1983) (The Congress' decision to leave intact one section of securities laws in the course of revising other sections of securities laws "suggests that Congress ratified" judicial interpretation given to that section.); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment of the [Commodity Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *Missouri v. Boes*, 299 U.S. 72, 75 (1936) (The Congress' permitting a provision of Bankruptcy Act interpreted by Court to "stand for many years . . . although amending . . . the Bankruptcy Act in other particulars . . . is persuasive evidence of the adoption by that body of the judicial construction.").

lation which clearly reflects the Congress' awareness of that interpretation. As this Court stated in *Lindahl v. OPM*, 470 U.S. 768, 782 (1985), the Congress' enactment of related legislation "without explicitly repealing the established [case] doctrine itself gives rise to a presumption that Congress intended to embody [the judicial interpretation in the statute the courts had construed]." That presumption becomes virtually conclusive where, as here, the Congress' actions were predicated on Section 1981 continuing to have the meaning attributed to it by this Court.

Following this Court's decision in *Jones v. Alfred H. Meyer & Co.*, the Congress passed the Equal Employment Opportunity Act of 1972.³⁰ In the course of enacting that legislation, both the House and Senate considered proposals to make Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the exclusive federal remedies for private discrimination in employment. These proposals, which were ultimately rejected, would have repealed Section 1981 insofar as it prohibits private racial discrimination in employment.

The amendment proposed in the Senate³¹ generated substantial objections from those who believed that Section 1981 served as a "valuable protection" for those who might "fall . . . in the interstices of the Civil Rights Act of 1964."³² Senator Harrison Williams, the floor manager and one of the original sponsors of the pending bill, objected that "[i]t is not our purpose to repeal existing civil rights laws," and noted that to do so "would severely weaken our overall effort to combat the presence of employment discrimination."³³ Specifically recognizing the scope of Section 1981, Senator Williams stated:

³⁰ Pub. L. No. 92-361, 86 Stat. 103 (1972). This Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

³¹ 118 Cong. Rec. 3173 (1972) (Hruska amendment).

³² *Id.* at 3170 (statement of Sen. Javits).

³³ *Id.* at 3171 (statement of Sen. Williams).

The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination, was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

Mr. President, the amendment of the Senator from Nebraska [Sen. Hruska] will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that. . . . I believe that to make title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the workers of our country."

Responding affirmatively to Senator Williams' plea that the Congress not "strip from th[e] individual his rights that have been established, going back to the first Civil Rights Law of 1866,"⁴⁰ the Senate rejected the repealing amendment.⁴¹

The House Education and Labor Committee similarly rejected an exclusive remedies provision, explaining that

the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . [It is] this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the

⁴⁰ *Id.* at 3371-72.

⁴¹ *Id.* at 3372.

⁴² *Id.* at 3373.

provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive."

The Committee minority also recognized that "charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as . . . the Civil Rights Act of 1866 [O]ur attempt to amend the Committee bill to make title VII an exclusive remedy (except for pattern or practice suits) was rejected."⁴³

A substitute bill containing an exclusive remedies provision was proposed in the House during the floor debates.⁴⁴ The sponsor of the substitute explained that "there would no longer be recourse to the old 1866 civil rights act."⁴⁵ Although vigorously opposed,⁴⁶ the substitute bill was adopted by a slim majority in the House.⁴⁷ In conference with the Senate, however, the House receded and a compromise version of the bill which contained no exclusive remedy provision became law.⁴⁸ The Congress thus unequivocally manifested its intent to preserve the scope of Section 1981 by rejecting efforts to eliminate the statute's application to private employment discrimination.

This legislative history played a significant role in persuading this Court in *Raxson* to adhere to its earlier interpretation of Section 1981:

⁴³ H.R. Rep. No. 238, 92d Cong., 1st Sess. 18-19 (1971).

⁴⁴ *Id.* at 46.

⁴⁵ 117 Cong. Rec. 31973-80 (1971) (Erlenborn substitute).

⁴⁶ *Id.* at 31973 (statement of Rep. Erlenborn).

⁴⁷ Members objected that the substitute bill would "repeal[] the Civil Rights Act of 1866 where it touches upon this field," *id.* at 31978 (statement of Rep. Eckhardt), and would "nullify the Civil Rights Act of 1866 . . . as far as employment discrimination is concerned." *Id.* at 32100 (statement of Rep. Hawkins).

⁴⁸ *Id.* at 32111-12.

⁴⁹ H.R. Conf. Rep. No. 839, 92d Cong., 2d Sess. 17 (1972).

It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1964, as interpreted by this Court in *Jones*, insofar as it affords private-sector employees a right of action based on racial discrimination in employment. . . .

427 U.S. at 174.

In October 1976, after the *Tillman*, *Johnson* and *Rosen* decisions, the Congress again signaled its approval of this Court's interpretation of Section 1981 in enacting the Civil Rights Attorney's Fees Awards Act of 1976.¹⁰ That Act permits the recovery of attorney's fees in actions against private parties under Section 1981.¹¹ The House Judiciary Committee summarized the reach of Sections 1981 and 1982 as follows:

Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald v. Santa Fe Trail Transportation Co.*, — U.S. —, 96 S. Ct. 1374 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman v. Wheaton-Horner Recreation Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as

¹⁰ Pub. L. No. 94-409, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1981).

¹¹ The Congress enacted the Civil Rights Attorney's Fees Awards Act in response to *Alperke Pipeline Service Co. v. Wilderness Society*, 421 U.S. 349 (1975). This Court had concluded in *Alperke* that the federal courts do not have power to award attorney's fees to a prevailing party in actions brought under Section 1981 (among other statutes), save in certain limited circumstances, absent express authorization from the Congress. The Act was passed after the Congress learned of *Alperke's* "devastating impact . . . on litigation in the civil rights area." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976).

the purchase of a home. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).¹²

The Committee expressly recognized that Sections 1981 and 1982 and other private discrimination remedies created by the Congress can reach the same private conduct:

With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1964, 42 U.S.C. § 1981, that the two procedures augment each other and are not mutually exclusive." . . . That view was adopted by the Supreme Court in *Johnson v. Railway Express Agency*¹³

The Committee also made clear that, "[a]s with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 [the Fair Housing Act] are complementary remedies, with similarities and differences in coverage and enforcement mechanism."¹⁴

The Senate Judiciary Committee considered the Civil Rights Attorney's Fees Awards Act especially necessary because the complementary modern-day remedies for private discrimination provide for attorney's fees. The Committee did not want litigants challenging the same discriminatory practices under the Reconstruction-era statutes to be deprived of such fees. As the Committee explained:

For instance, fees are now authorized in an employment discrimination action under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites

¹² H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976).

¹³ *Id.* at 4 n.2 (quoting H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971)).

¹⁴ *Id.* at 4 n.3.

to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.²⁹

By extending the right to recover attorney's fees to suits brought under Sections 1981 and 1982, the Congress ensured that litigants would be financially able to challenge private discrimination under both the Reconstruction-era and modern civil rights statutes.

As this legislative history demonstrates, the Congress' approval of, and its intent to build upon, this Court's interpretation of Section 1981 as reaching discrimination by private parties are unmistakable. The Congress has been fully cognizant of how Section 1981 has been construed by this Court. It has rebuffed legislative efforts to reverse that construction; it has approved and relied on the construction given the statute by this Court; and it has strengthened Section 1981 as a remedy by making attorney's fees available to prevailing parties, thereby encouraging Section 1981's more effective use. Congressional intent could hardly have been more clear if the Congress had reenacted Section 1981 following *Rosen*. However, "[i]n the legal context in which Congress acted, this was unnecessary."³⁰

²⁹ S. Rep. No. 1011, 90th Cong., 2d Sess. 4 (1976). See also 121 Cong. Rec. 20006 (1975) (statement of Sen. Tunney) (Title VII and Section 1981 "protect[] similar rights").

³⁰ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 181.

CONCLUSION

For the foregoing reasons, this Court should decline to overrule the interpretation of 42 U.S.C. § 1981 adopted in *Rosen v. McCrary*, 427 U.S. 160 (1976).

Respectfully submitted,

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No. 87-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
v.

MCLEAN CREDIT UNION,
Respondent,

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

**MOTION FOR LEAVE TO FILE AND
BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONER**

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**MOTION FOR LEAVE TO FILE AND
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The American Bar Association hereby moves, pursuant to Rule 36.3, for leave to file the attached brief amicus curiae in support of petitioner's position that *Runyon v. McCrary*, 427 U.S. 160 (1976), not be overruled. While consent to file this brief has been obtained from petitioner, counsel for respondent has declined to grant consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

The ABA is a voluntary national organization of lawyers. Its more than 347,000 members come from every state and territory and represent a broad cross-section of the legal profession. The ABA's interest in this case

flows from its opposition to racial discrimination and its concern that the abandonment of such an important and well-established Supreme Court precedent as *Rukey* would be harmful to the legal system.

For many years the ABA has taken a strong position opposing racial discrimination within its own organization, within other institutions of the legal system, and in society at large.¹ Effective legal remedies play a significant role in eradicating racial discrimination. Section 1981 of Title 42 of the United States Code is an important—and, in many instances, the exclusive or superior—remedy for victims of private racial discrimination in the making and enforcement of contracts.

Moreover, the ABA is concerned for its lawyer members and their clients about the overruling by this Court of one of its considered decisions construing a congressional enactment. The legal profession and the clients it serves share an important stake in the proper application of the doctrine of *stare decisis*.² In advising clients and formulating litigation strategy, lawyers assume that this Court's interpretations of federal statutes are binding and, except in extraordinary

¹ See American Bar Association, *Policy and Procedures Handbook* 126 (1987) (describing August 1965 resolution on ABA anti-discrimination policy); American Bar Association Report No. 23 (February 1972) (resolution condemning discriminatory hiring practices within the legal profession); American Bar Association Report No. 124 (February 1980) (resolution supporting legislation prohibiting housing discrimination); American Bar Association Report No. 120 (August 1984) (resolution declaring it inappropriate for judges to belong to discriminatory organizations); American Bar Association Report No. 120 (August 1986) (resolution opposing discrimination in judicial selection).

² See generally 1 Kent, *Commentaries on American Law* *443 (1826) ("It is by the notoriety of such rules [of binding precedent] that professional men can give safe advice to those who consult them . . ."); see also 1 Hart & Sacks, *The Legal Process* 587 (tent. ed. 1958).

circumstances, enduring. When this Court suddenly abandons its statutory precedents, legitimate expectations based on legal advice are disturbed and public trust in the profession and our legal system is shaken. The ABA has an interest in the Court not overruling statutory precedents absent the most compelling reasons, none of which is present in this case.

As the largest membership organization of lawyers in this country, the ABA brings to this case a perspective that is broader than and different from that of petitioner. The ABA believes that the attached brief conveys that perspective in a manner that would be of assistance to this Court. Accordingly, the ABA respectfully seeks the Court's leave to file the attached brief supporting petitioner.

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QUESTION PRESENTED

This brief for the American Bar Association as amicus curiae deals only with the question that the Court in its order of April 25, 1988, asked the parties to address on reargument: Whether the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-107

BRENDA PATTERSON,
v. *Petitioner,*

MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONER**

This brief is submitted on behalf of the American Bar
Association as amicus curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The interest of the American Bar Association is set
forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

For two decades, our Nation's dedication to racial justice has been reflected in and served by the application of 42 U.S.C. § 1981 to prohibit private acts of discrimination in the making and enforcement of contracts. The three branches of the federal government, the legal profession, and those who are directly affected have oper-

ated on this understanding of the statute and ordered their affairs accordingly. The Court's decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), rendered in the case of black children denied admission to private schools on account of their race, simply confirmed the settled fact that Section 1981 reaches private conduct. The issue was correctly resolved then. It should not be reopened now.

Independent of the fact that *Runyon* correctly construed Section 1981, the doctrine of *stare decisis* strongly militates against a retreat from that decision. The rule confirmed in *Runyon* derived direct support from earlier decisions of this Court, embraced a construction of Section 1981 already unanimously adopted by the lower courts, and occurred subsequent to congressional action endorsing the Court's interpretation. At the time *Runyon* was decided, the Court heard the relevant legal and factual arguments on both sides of the question, including a dissenting view cogently expressed by Justice White. And events since 1976 do not justify abandonment of this precedent, which has been widely relied upon and which advances important anti-discrimination policies that have gained ever more widespread acceptance in our society.

ARGUMENT

I. *RUNYON* CONFIRMED A PRINCIPLE OF RACIAL JUSTICE ALREADY WELL ESTABLISHED AND PLACED IT BEYOND QUESTION.

Section 1981 guarantees to "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." By its terms, the statute condemns racial discrimination without regard to whether the person guilty of such discrimination is a government official or a private citizen. It has been uniformly construed for the past twenty years to be thus universal in its condemnation of racial discrimination. In the

process, Section 1981 has become a vital, everyday part of civil rights jurisprudence and practice, consistently understood as reaching all forms of racism in the making and enforcement of contracts.

Section 1981 provides an effective and important remedy for acts of racial discrimination, both in instances where no other remedy is available and in others where the remedies available are either inadequate to provide redress or insufficient to serve as reliable deterrents. No other federal statute addresses private school discrimination, the very matter before the Court in *Runyon*. Numerous types of private discrimination—by clubs, small employers, and others—are covered on the federal level only by Section 1981. Even where there is some overlap between Section 1981 and other remedies, the Section 1981 remedy is decidedly superior in various respects. See pages 10-11, below.

This Court's holding in *Runyon*, which itself rested on precedent, decisively vindicated the enacting Congress' commitment to racial justice and was thought once and for all to have removed any lingering doubt that Section 1981 prohibits private acts of discrimination. Indeed, the Court opened its discussion of the law in *Runyon* with the observation that "[i]t is now well established that . . . § 1981 prohibits racial discrimination in the making and enforcement of private contracts." 427 U.S. at 168. The Court cited for this proposition *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975), and *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973), which dealt with Section 1981, and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968), the foundation case, which dealt with the companion provision, 42 U.S.C. § 1982, but clearly stated that Section 1981 as well as Section 1982 reached private conduct.

Runyon thus confirmed an interpretation of Section 1981 that had already received the Court's imprimatur and had been applied for several years in the federal

courts.¹ Well before 1976, the Executive also affirmatively recognized that this construction of the law was both correct and well established.² Indeed, in its amicus curiae brief in the *Runyon* case, the United States said that "it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts." Brief for the United States as Amicus Curiae at 13, *Runyon v. McCrary*.

More important, Congress, whose enactment this Court interpreted in *Runyon* and in the "line of authority"³ that preceded it, was aware at least as early as 1972 that Section 1981 was being applied to private-sector discrimination in employment and other areas. When legislation was introduced in the Senate to vitiate this application through a partial repeal of Section 1981, it was twice rejected. 118 Cong. Rec. 3372-73, 3965 (Feb. 9 & 15, 1972). Congressional endorsement of this Court's understanding of Section 1981 and active congressional

¹ The district courts interpreted Section 1981 as covering private conduct as early as 1968 and were swiftly followed by an unbroken line of appellate rulings reaching the same result. See *Dobbins v. Local 212*, 292 F. Supp. 413, 442 (S.D. Ohio 1968); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 482-83 (7th Cir.), cert. denied, 400 U.S. 911 (1970); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1099 (5th Cir. 1970), cert. denied, 401 U.S. 948 (1971); *Young v. ITT*, 438 F.2d 757, 759-60 (3d Cir. 1971); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *Brady v. Bristol-Meyers, Inc.*, 460 F.2d 621, 623 (8th Cir. 1972).

² See *Stebbins v. Continental Ins. Co.*, 442 F.2d 843, 846-47 (D.C. Cir. 1971) ("The [Equal Employment Opportunity] Commission argues that [Section 1981] creates a cause of action for racial discrimination in private employment . . ."); cf. Brief for the United States as Amicus Curiae at 8-9, *Jones v. Alfred H. Mayer Co.* ("Nor do we believe there is any textual, historical, or constitutional obstacle to applying [Section 1981] . . . to wholly private action.").

³ 427 U.S. at 169 (Stevens, J., concurring).

commitment to its judicial application underscore the extent to which the principle of *Runyon* was settled and accepted even before its confirmation by that decision.

In the dozen years since this Court's ruling in *Runyon*, the express inclusion of discriminatory private conduct within the prohibition of Section 1981 has been placed beyond the realm of debate. This is vividly illustrated by the decision of the Court during the 1986 Term in *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987). The Court did not question whether Section 1981 reached private conduct but whether discrimination in private employment against an Arab was racial discrimination within the meaning of Section 1981. The Court unanimously held that it was, 107 S. Ct. at 2028, and at the same time held that discrimination against Jews was racial discrimination within the meaning of Section 1982, *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019, 2022 (1987). Similarly, the inclusion of private conduct in Section 1981 was the agreed premise in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982),⁴ where the dissenting members of this Court would have extended the statute still farther by holding a private actor liable for unintended discrimination.

Decisions such as these have fortified the fact that Section 1981 prohibits private discriminatory conduct. The lower courts and the legal profession have faithfully followed this Court's clear mandate. The issue has long been settled. It should not be unsettled at this late date.

II. THE VALUES UNDERLYING THE DOCTRINE OF *STARE DECISIS* STRONGLY MILITATE AGAINST RECONSIDERATION OF *RUNYON*.

The fact that Section 1981 prohibits private acts of discrimination in the making and enforcement of contracts has been placed beyond dispute during the past

⁴ See especially *id.* at 388.

twenty years. This correct understanding has been embraced or accepted by the three branches of the federal government, the legal profession, and both the victims of and participants in discriminatory practices. The expectations and reliance generated during this period alone warrant adherence to the holding in *Ranjon v. McCrury*. To the extent that major changes in law and society have occurred since *Ranjon*, they have only consolidated the policy advanced in *Ranjon* condemning all forms of racial discrimination. No legal or social development of the past several years could conceivably justify a retreat from *Ranjon*.

Stare decisis is, independent of any other consideration, a compelling reason for not overruling *Ranjon*. *Stare decisis*, as this Court has observed, "is a doctrine that demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1982). Indeed, it has been said that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941, 2948 (1987) (plurality opinion). *Stare decisis* protects the integrity of the legal system by guaranteeing continuity and predictability in the administration of justice. Because ours is a country dedicated to the rule of law, the doctrine of *stare decisis* is "a natural evolution from the very nature of our institutions." Lile, *Some Views on the Role of Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916).

Stare decisis, like fealty to constitutional and statutory text, is an essential safeguard against the unprincipled exercise of judicial authority. As Hamilton wrote in the *Federalist*, "[t]o avoid an arbitrary discretion in the Courts, it is indispensable that they should be bound down by strict rules and precedents." *The Federalist* No. 78, at 529-30 (Cooke ed. 1961). The point was reiterated by the first Justice White in a dissent ultimately vindic-

cated by the adoption of the Sixteenth Amendment. He said that "[t]he fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (dissenting opinion).

The doctrine of *stare decisis* thus "permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).⁵ Of course, precedent is not a straitjacket. But, as Justice Robert Jackson cautioned, there must be limits on the role judges play in changing the law of a democratic society. "Moderation in change is all that makes judicial participation in the evolution of law tolerable." Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 334 (1944).

Respect for precedent establishes the Court as the guardian of the laws, while disrespect for precedent undermines regard for the Court itself. In his characteristically understated way, Justice Powell put it best: "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of . . . precedents." *Garcia v. San Antonio Transit Authority*, 469 U.S. 528, 559 (1985) (dissenting opinion).

As a consequence of its centrality in our legal system, *stare decisis* imposes a "severe burden on the litigant who asks [the Court] to disavow one of [its] precedents." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). "[A]ny departure from the doctrine of *stare*

⁵ *Accord Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970) (stressing "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments"); *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring) (deference to precedent sustains confidence in judicial respect for "impersonal rules of law"); Cardozo, *The Nature of the Judicial Process* 112 (1921) (adherence to precedent ensures impartiality).

decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

It is familiar learning that *stare decisis* is least commanding in constitutional cases because there is no easy alternative to overruling by which the Court's constitutional interpretations can be modified. Only the Court could correct the error of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and make the Fourteenth Amendment the instrument of racial justice it was intended to be, as it did in *Brown v. Board of Education*, 347 U.S. 483 (1954). Congress could not. By contrast, the force of *stare decisis* is greatest in cases involving statutory construction because the lawmaking body is free to correct any error the Court may have made.⁶

Stare decisis in the construction of statutes demands special respect where, as here, Congress has embraced the Court's original holding. Justice Harlan's explanation of his concurrence in *Monroe v. Pape*, 365 U.S. 167 (1961), has become a standard formulation of the heavy burden borne by one asking the Court to overrule a precedent Congress has approved.⁷ He spoke of both "the policy of *stare decisis*, as it should be applied in matters of statutory construction," and, "to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation." 365 U.S. at 192. He said that the two together "require[d] that it appear *beyond doubt*" that the challenged precedents "misapprehended" the meaning of the

⁶ See *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 429 n.34 (1986) (citing *NLRB v. Longshoremen*, 473 U.S. 61, 84 (1985), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)); Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 540 (1948); cf. *Busie v. United States*, 446 U.S. 398, 417-18 (1980) (Rehnquist, J., dissenting) ("Were [the issue] demonstrably a case of statutory construction, I could acquiesce to the Court's reading . . . in the interest of *stare decisis*.").

⁷ See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 715 (1978) (Rehnquist, J., dissenting).

statute in issue "before a departure from what was decided in those cases would be justified." *Id.* (emphasis added). The "indications of congressional acceptance" are as unmistakable in this case as are the demands, apart from congressional ratification, of "the policy of *stare decisis*." Congress, as this Court will be told in other briefs, ratified *Runyon* through subsequent legislation that built on an understanding that Section 1981 meant what *Runyon* said it meant and through explicit rejection of proposed legislation that would have contracted the reach of Section 1981. Particularly in these circumstances, it would be appropriate to leave any modification to Congress.⁸

To be sure, as the listing of cases in the Court's per curiam opinion setting the case for reargument illustrates, the Court has on occasion overruled its statutory precedents. In the Court's overruling decisions, many made according to the less demanding standards for constitutional cases, the extraordinary circumstances that might justify the abandonment of precedent are identified. Precedent may be disregarded when the rule of a case has proven unexpectedly difficult to apply;⁹ when changed legal circumstances have created an internal inconsistency between an important and ongoing legal policy and an earlier, discredited legal regime;¹⁰ when changed mores have rendered the earlier decision incompatible with social progress;¹¹ or when new and unanticipated considerations have emerged since the time of the

⁸ See *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long-standing that is to be remedied by the Congress and not by this Court. . .").

⁹ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539-547 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976).

¹⁰ See *Puerto Rico v. Brandsted*, 107 S. Ct. 2802, 2809 (1987), overruling *Kentucky v. Dennison*, 24 How. 66 (1861).

¹¹ See Cardozo, *The Nature of the Judicial Process* 151-52 (1921); see, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954).

initial decision, providing judges with unforeseen and unforeseeable information.¹²

Runyon v. McCrary exemplifies a decision entitled to *stare decisis*. The recognized exceptions to *stare decisis* simply do not apply. The rule of *Runyon* was being applied well before 1976 and it has been successfully applied and extended since then. *Runyon* itself embodies a policy of the highest order of importance, one that has engaged our lawmakers more perhaps than any other in recent years, the policy of extirpating racial discrimination. Changes in mores since *Runyon* have been in exactly the anti-discrimination direction signaled by the Court's decision.

Finally, no unanticipated evidence or results have emerged to alter the issues considered by the Court in deciding *Runyon*. The factors that argued for and against the *Runyon* interpretation of Section 1981 were fully aired and considered at the time. The reasoned opinion in *Runyon* was correct and should not be subject to periodic revisitation.¹³

The reliance and expectations generated by this Court's decisions in *Runyon* and its antecedents also present a compelling reason for leaving it undisturbed. Because the remedies provided by Section 1981 exceed in scope the remedies provided by other anti-discrimination laws, overruling *Runyon* would work a forfeiture on many individuals, including those who have relied upon their lawyers' advice in situations where an alternative remedy or procedure was available. For example, a trial by jury is guaranteed in an action for damages under Section 1981; it is not available under Title VII of the Civil Rights Act of 1964. Section 1981 confers on plaintiffs the right

¹² See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984).

¹³ Cf. *Patsy v. Board of Regents*, 457 U.S. 496, 517 (1982) (White, J., concurring) ("Whether or not this initially was a wise choice, these decisions are *stare decisis*.").

to recover punitive damages; by contrast, Title VII limits monetary relief to back pay. The longer statute of limitations and more favorable remedial regime of Section 1981, together with fears of *res judicata*, make it virtually certain that numerous clients, on their lawyers' advice, will have forgone Title VII or state law claims because of what was represented to be the availability of a Section 1981 remedy. Their legitimate expectations would be thwarted were *Runyon* to be overruled. This Court has emphasized that adherence to precedent is crucial when such reliance interests are at stake: "[I]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." *United States v. Mason*, 412 U.S. 391, 399-400 (1973); see also *Oklahoma City v. Tuttle*, 471 U.S. 808, 818 n.5 (1985) (plurality opinion).¹⁴

The long-standing and well-considered principle of racial justice confirmed in *Runyon* strongly suggests that it should not be reconsidered. Any doubt in this regard, however, should vanish when one considers the pattern of congressional endorsement of the principle and the extent to which it has been relied upon. In light of the manifest inapplicability of the exceptions to *stare decisis*, *Runyon* should be left undisturbed.

¹⁴ While *stare decisis* should not be blindly applied, its unjustified abandonment would impair lawyers' ability to provide meaningful advice. In earthy language, John W. Davis once suggested that clients would substitute casting dice for consulting lawyers if their expectations were dashed by a practice of overruling precedents. Harbaugh, *Lawyer's Lawyer* 416 (ed. 1978) (quoting 1942 letter to *Hartford Courant*).

CONCLUSION

Runyon v. McCrary was correctly decided. The Court should decline to reconsider it.

Respectfully submitted,

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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIO, JR.
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No. 87-107

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

BRENDA PATTERSON ,
Petitioner,

v.

MCLEAN CREDIT UNION,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF
CURTIS AND SANDY McCRARY
SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the interpretation of 42 U.S.C. sec. 1981 adopted by the Court in Runyon v. McCrary, 427 U.S. 160 (1976) should be reconsidered?

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INTEREST OF THE AMICUS CURIAE

Sandra and Curtis McCrary are parents of a son, who at a preschool age, was denied admission to a private day care facility solely on the basis of his race. Finding that distinction unsatisfactory, the McCrarys filed an action in federal district court based on 42 U.S.C. sec. 1981. In 1976, this Court ruled that the McCrarys could use that statute to seek redress for harm caused from racial discrimination by private actions. That ruling allowed their son to grow in an atmosphere less charged by the necessary tensions created by invidious racial discrimination. Twelve years later, when this Court requested

reargument involving its earlier interpretation of 42 U.S.C. sec. 1981 (1982 and Supp IV), as set out in Runyon, the McCrarys decided to let this Court know the happier ending to their discrimination story resulting from the decision. Within this document's discussion of stare decisis is a statement from Mr. and Mrs. McCrary.

No. 87 - 107

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1987

BRENDA PATTERSON

Petitioner

v.

MCLEAN CREDIT UNION

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF CURTIS AND SANDRA McCrARY
AS AMICUS CURIAE
SUPPORTING PETITIONER

Ms. Brenda Patterson, Petitioner
here, has claimed that certain methods in
which she was treated by her former
employer and by co-workers at her former
place of employment were racially

discriminatory and constituted a form of racial harassment. Petitioner pled that her racial harassment constituted a discrete violation of 42 U.S.C. Sec. 1981. The district court held that a claim for racial harassment is not cognizable under Sec. 1981. Patterson v. McLean Credit Union, ___ F.Supp. ___, 42 FEP Cases 659 (M.D. N.C. 1985). That holding was affirmed by the Fourth Circuit, finding that the right to establish a contractual relationship with an employer that is free of racial factors does not include the expectation of freedom from workplace racial harassment. Patterson v. McLean Credit Union, 885 F.2d 1143 (1986).

Petitioner Patterson claims that certain behavior to which she was subjected on her job created racial

harassment against her because she is black. That her incidents may not amount to a legal definition of harassment is not here at issue. That any behavior of racial harassment may form the basis of a cause of action against her employer pursuant to Sec. 1981 is the issue addressed by Patterson.

Since the question is whether or not "racial harassment" of any ilk is redressable by 42 U.S.C. Sec. 1981, the particular circumstances of Petitioner Patterson's claim and her ability to prove them are not yet relevant. Further, since the question of whether such behavior falls within the contract between the parties seems answerable without reconsideration of Runyon v. McCrary, 427 U.S. 160 (1976), the activism in requesting such

reconsideration indicates that a decision far beyond the facts of Patterson is being considered.

Because of the limits of the Patterson grant of certiorari and the favored judicial policy of ruling narrowly when exercising the power of the judiciary, Amicus McCrary would first argue that reconsideration of the Court's prior decision is not necessary. The Court could render a fair determination, and even prevent an expansion of the scope of 42 U.S.C. sec. 1981, if a majority so determines, without the need to actively review settled law.

In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), both Justice Powell, in concurrence (at p. 709 n. 6), and Chief Justice Rehnquist (then Justice), in

dissent (at p. 718), voiced the oft-spoken opinion that "this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing." Much weight must be given by this Court to the reliance that citizens place on law properly pronounced by this Court. In this instance, the deterrence felt by private citizens to harness racially discriminatory acts against others is undoubtedly due, at least in part, on the clear pronouncements spoken in Runyon. Others, of course, feel much safer since that decision. Can it possibly be that private racism, currently redressable in federal courts as reprehensible societal behavior, will no longer be mediated in our judicial system?

If one main tenet of our legal

system is that it provides an opportunity to effectively redress harm, then a system to determine whether an act or series of actions is harmful is required. That evaluation should employ the sensibilities of today's values and not those values based on the ambiguously discerned intent of a Congress more than one century past. 1/

1/ A jury, by definition, imposes the values of today. Sec. 1981 provides a jury trial, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) and Title VII of the Civil Rights Act of 1964 does not. The elimination of sec. 1981 from the employment context may not interfere with the rights of an employee who has been the victim of racial discrimination at the hands of his employer from reaching court but it will interfere with his ability to have a panel of his peers judge those actions and greatly interferes with the desire of a company to settle the differences prior to a trial before a jury. That sec. 1981 also provides for punitive damages not recoverable under Title VII is another aspect it has provided to eliminate discrimination in employment.

The concept that racial discrimination in any form is harmful to our society has been voiced by this Court on a number of occasions. For example, in Newman v. Piggie Park Enterprises, Inc., 399 U.S. 400, 402 (1960), reference was made to repeated Congressional assessments that eradication of racial discrimination was "a policy ... of the highest priority". This policy was again relied upon in Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). There can be little doubt that the elimination of racial discrimination is acknowledged as a proper judicial objective.

This concept of eradication of

^{1/} (Cont.) As Congress has repeatedly recognized, the deterrent effect of monetary punishment is thought to be great. E.g., the award of treble damages for RICO Act violations, 18 U.S.C. sec. 1964(c) (1982 and Supp IV).

racial injustice as being of a high priority can also be discerned from the Court's repeated affirmation of the theory of private attorneys general. In providing a generous construction to the attorney fee provision of Title II of the Civil Rights Act of 1964, the Court approved the use of private attorneys general to attack discriminatory practices which it determined were adversely affecting not only blacks but all citizens. Newman, supra, 390 U.S. at 402. All of society benefits from the elimination of unjust racial distinctions. This was reiterated in a related way in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) where this Court granted standing to a white to challenge private racially discriminatory housing

practices. Each citizen is thought to suffer when racial discrimination is practiced, even if it is by the loss of association with other citizens of a slightly different background. The Court there repeated Senator Javit's comments indicating that race discrimination victimizes "the whole community...." 409 U.S. at 211.

A reading of these and related decisions of the Court demonstrates its collective belief that the harm caused by racial discrimination, of whatever type, pervades the entire fabric of our society and that its elimination is cause for monetary payments and other forms of judicially awarded relief. If this is so, the question then becomes whether Sec. 1981 provides a proper vehicle to accomplish this specific goal of society.

One valid method of assessment would be to learn of the effects of the Runyon v. McCrary decision from one party involved in that litigation. Sandra and Curtis McCrary participated in the legal process to attain for their son the same rights others of his age enjoyed. Now the progress that their determination wrought may be set aside. The following statement is set forth to indicate their feelings:

"Our prospective is as parents of Michael McCrary, who in 1972 at the age of two was denied admission to one of the private schools in Northern Virginia that were defendants in Runyon. That incident began a 4 1/2 year journey through the legal system, culminating in the Supreme Court's June 1976 decision.

"By the time the decision was rendered, Michael was in the first grade

of public school, so admission to the private daycare center was a moot issue. Having remained in the Virginia area, however, we've been able to observe the positive impact of the decision on the community.

"We are concerned that the recent move by the Court to revisit the Runyon decision could erode the progress realized in the past 12 years. We are worried, more specifically, that the Court's action may be a harbinger of an intent to retreat from what we believed and trusted were established precedents.

"For Michael, now 17 and about to enter his freshman year of college, Runyon v. McCrary is an abstraction -- an incident we've discussed with him, usually in the context of a school assignment on civil rights. As with many

other young black men and women born after the passage of the Civil Rights Act of 1964, much of the civil rights struggle seems so very removed from his reality.

"Michael's self-image is intact, not having been indelibly marked by the injustice and indignity of segregation. For his generation, the sons and daughters of the first beneficiaries of equal access to education, housing, and job opportunities, the American dream can in fact be realized.

"Of course, we do not delude ourselves: problems still exist. However, this does not diminish the significant social progress achieved as a result of hard-fought civil rights victories. Our nation can, and should, be proud of the advances made over the last 25 years

toward the elimination of racial discrimination, both public and private.

"With every successive victory, we as a people moved further away from a past that was shadowed by racial divisiveness. Today, even some of the most intractable foes of civil rights have acknowledged that the removal of racial barriers has enhanced the general welfare of our society.

"A key contributor to this progress has been our judicial system, and the willingness of the courts to interpret the law in a manner consistent with current concepts of social good. We believe that the intent of the legislators in passing the 1866 civil rights laws, in particular sec. 1981, the statute at issue in Bunyon, was to extend to a people formerly disenfranchised by

slavery full rights as citizens of our nation.

"Fundamental to our society is the right to enter into contracts, whether for property or services. The extension of sec. 1981 to areas of private discrimination affecting equal access to housing, employment, and education was a logical and necessary progression in bestowing full citizenship rights on a people previously denied.

"The private schools that were the focus in Bunyon did not receive direct federal funds -- but they advertised in the Yellow Pages, sent fliers out through general mailings, and enjoyed tax exemptions. In essence, the schools' status as "private" seemed to be primarily a matter of racial exclusivity, since interested white persons had only

to apply to gain admission.

"The Supreme Court's ruling in Guyon has enabled the exposure and elimination of some of the remaining vestiges of racial discrimination. In the past, by hiding under a cloak of privacy, such institutions were openly able to disregard the civil rights laws. Under sec. 1981 and subsequent interpretations, black Americans are afforded an effective vehicle for challenging these remaining barriers to racial equality.

"As a free and open society, where individual initiative and merit are the espoused criteria for advancement, there should be no place for a policy of exclusion based on one's race or other immutable characteristics. That policy belongs to another time and place from

which we have hopefully evolved. Let there be no equivocation on matters so fundamental to what we have come to know and believe in as the American way.

"For Michael, and others in his generation and those to follow, the Court should uphold the original ruling. Indeed it must -- if we are to continue as a society to move forward."

These words of the McCrarys indicate that Bunyon has worked well for them, since 1976. Although only viewed on an individual basis, it would seem that the Court's decision had a beneficial effect. Since the correctness of the Court's 12 year old ruling must involve a "full airing of all the relevant considerations," Justice Powell in Monell, at 709, n 6, Amicus McCrarys offer their personal experience to the

Court.

Because this Court's review of Runyon must of necessity involve the principle of stare decisis, the McCrarys opinion has relevance. As Justice Brandeis has stated in Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 412 (1932), and often thereafter quoted, including in Monell, supra, the reasons for deviating from the straight path of stare decisis should be limited to bringing "opinions into agreement with experience and with facts newly ascertained...." Neither the experience since 1976 or facts newly ascertained since then provides the valid basis for reconsideration of Runyon envisioned by this honored jurisprudential principle. The addition of new justices or the elevation of prior members of the Court

are certainly not the new facts to which Justice Brandeis makes reference.

The legislative history, even though previously known, is relevant. It is, however, but one factor in the calculus of the determination. As both Justices Powell and Stevens pointed out in the original decision in Runyon, the Court at that time was not writing on a clean slate. The time for analysis of the situation by only reviewing the legislative history has passed with the Court's first decision on the Civil Rights Acts where it was determined that a cause of action existed against private acts. (Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and more specifically for 42 U.S.C. sec. 1981, Johnson, supra). Now the revisit of Runyon must encompass many other factors, as set forth in the

principles of stare decisis. It would be a slim reed to rest a holding which reverses a ruling that works on the same legislative history already analyzed where that history requires a twentieth century interpretation of nineteenth century documents.

As Justice Brennan stated in Monell, 436 U.S. at 695, one factor of stare decisis principle is the consideration of the departure from the prior practice that the decision under review visits on the state of the law at the time of the decision. Here, Bunyon was not a departure from prior practice, but rather the determination to allow the McCrarys to have the ability to sue directly the private parties allegedly refusing to contract with them because of their race fit perfectly with judicial

interpretations of other civil rights acts. For example, Sec. 1982 has been interpreted to allow for individual law suits for acts that are strictly private, i.e., not performed by or related to any governmental entity. Jones, supra.

The decision in Bunyon was also in step with other civil rights laws providing for the attack on privately practiced racial discrimination. The Fair Housing Act, 42 U.S.C. secs. 3601 et seq.,

(1982 and Supp IV) allows citizens to initiate legal action by directly confronting those who caused them harm, through the mediation of the legal system, even if that harm was committed solely by a private citizen. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. secs. 2000e et seq., (1982 and Supp IV) also provides an avenue for a

harmful citizen to sue for compensation from one who has committed that harm. Again, the harm could be performed only in the private sector and still be redressable. In both instances, although the government may become involved, it need not be beyond providing the opportunity for resolution of the allegations. If that opportunity is not fruitful, or even if it does not occur, a person still have access to the courts to challenge purely private actions by others.

Bonyon, therefore, provides a person the ability to seek restitution in the courts for private discrimination as does other civil rights laws. It is "so consistent with the warp and the woof of civil rights laws as to be beyond question." Bonyon, 436 U.S. at 696. Thus,

the Court should have no need to tamper with the decision.

The Runyon decision was also thoroughly consistent with the congressional intent that was apparent in 1976. The same year this Court was again deciding that citizens may sue for privately engendered harm, Congress was passing the Civil Rights Attorney Fees Award Act, 42 U.S.C. sec 1988 (1982 and Supp IV). That act provides that successful private attorneys general can pay the attorneys that were engaged by them to carry forth the claims of discrimination. That act negated the American Rule of attorneys fees awards, as stated in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975), as to the specific statute involved here. The congressional intent


to provide fees for successful plaintiffs in a sec. 1981 action certainly does not comport with any interpretation that would limit in any way the ability of private citizens to bring such actions.

Further, regarding the intent of Congress, tacit approval for the decision in Bunyon exists. Congress has had ample opportunity to limit the ability of citizens to use sec. 1981 against other private persons. No such action on the part of Congress has occurred, making it clear that private citizens are to be helped, not hindered, in their efforts to obtain this nation's highest priority. The harm of discrimination is viewed by Congress as a leech that should no longer suck the vitality of our populace. Bunyon was another weapon for the fight that Congress has joined, and had named the

highest priority. Truly, the Congress was acting as representatives of the people. As Justice Stevens wrote, in Bunyon, "For even if Jones did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today."

For the foregoing reasons, Sandra and Curtis McCrary respectfully request this Court to not reconsider its prior decision in Bunyon or, alternatively, to uphold its prior decision.

Respectfully submitted,



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IN THE

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**BRIEF ON REARGUMENT FOR THE LAWYERS'
COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

BRENDA PATTERSON,

Petitioner,

v.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF ON REARGUMENT FOR THE LAWYERS'
COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to Blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of Blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

Amicus has a direct interest in the law governing the construction and application of the civil rights statutes. *Amicus* and its clients litigate under these statutes regularly and thus have a substantial incentive to prevent diminution of the statutes' powers as sources of redress for civil rights violations.

The Lawyers' Committee has a particularly strong interest in preserving the section 1981 anti-discrimination rights recognized by this Court in *Ramsey v. McCrory*, 427 U.S. 160 (1976). The Washington Lawyers' Committee represented McCrory in that case and urged the result reached by the Court. Since that time, the Lawyers' Committee has been involved in many section 1981 cases and views that statute, as interpreted in *Ramsey*, as essential in the battle against discrimination.

Amicus submits this brief to emphasize the view that, even if a majority of this Court were now to conclude that *Ramsey* was incorrectly decided, it should not be overruled under established principles of *stare decisis*. That is so especially considering "congressional agreement" with the result, *Ramsey*, 427 U.S. at 175, and its complete consistency with the anti-discrimination "moves of [to]day", *id.* at 191 (Stevens, J., concur-

ring) (citing Justice Cardozo). Consideration must also be given to the serious harm overruling *Ramsey* would cause to many pending cases in the lower courts and to the future enforcement of civil rights under law.

SUMMARY OF ARGUMENT

Twelve years ago this Court held in *Ramsey v. McCrory* that 42 U.S.C. § 1981 prohibits private, commercially operated, non-sectarian schools from discriminating on the basis of race, and therefore that section 1981 "reaches purely private acts of racial discrimination". 427 U.S. at 170.

This Court now asks "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Ramsey v. McCrory* should be reconsidered?" *Paterson v. McLean Credit Union*, 108 S. Ct. 1419, 1420 (1988) (citation omitted). The answer is no.

For the reasons set forth by the majority and concurring opinions in *Ramsey*, and those set forth in the 1976 Lawyers' Committee Brief for Respondent McCrory, the Lawyers' Committee believes that the legislative history of the 1866 Civil Rights Act and the doctrine of *stare decisis* overwhelmingly support the result reached in *Ramsey*. There is, therefore, in the Lawyers' Committee's view, no cause or reason to reconsider the interpretation of section 1981 adopted by the Court in *Ramsey*. Moreover, *stare decisis*, itself a fundamental basis for the majority and concurring opinions in *Ramsey*, counsels even more strongly now than it did in 1976 against overruling this important statutory precedent.

Unless a prior decision is "'flatly' unjust"¹ or "diserves important interests",² *stare decisis* constrains this Court from reconsidering statutory precedent. For *stare decisis* not to apply, there must be "special justification",³ for "[o]nly the

1 Pound, *What of Stare Decisis?*, 10 Fordham L. Rev. 1, 6 (1941).

2 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 216 (1978) (Brennan, J., dissenting).

3 *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984).

most compelling circumstances can justify this Court's abandonment of . . . firmly established statutory precedent[]".⁴

Dean Pound expressed his view on this point a half century ago:

"[N]othing less than an overriding conviction that a precept fixed by a prior decision was contrary to the principles of the law so that it had an ill effect upon the process of determining new questions by analogical reasoning and was, as Blackstone puts it, 'flatly' unjust in its results, could justify judicial rejection of it."⁵

Whether or not *Runyon* was correctly decided twelve years ago, it is not so "contrary to the principles of the law so that it [has] had an ill effect upon the process of determining new questions by analogical reasoning". Nor could anyone seriously argue today that the decision in *Runyon* is "'flatly' unjust in its results". *Runyon*'s recognition of an unquestionably constitutional statutory right to be free from private racial discrimination cannot be deemed a "'flatly' unjust" result.

Other fundamental *stare decisis* considerations also weigh heavily against overruling *Runyon*. First, this Court has repeatedly and recently reaffirmed the *Runyon* holding, thereby directly implicating the purposes of *stare decisis*—consistency, predictability and stability—values central to the very concept of the rule of law. Second, *Runyon* is statutory precedent. This Court has long recognized that it is most bound by *stare decisis* when reconsidering statutory precedent, especially in a case such as *Runyon*, where Congress explicitly endorsed that precedent only four months after it was handed down by passage of the Civil Rights Attorney's Fees Award Act of 1976. See *infra* at 14-16.

This is not a case where the Court is called upon to address asserted error of constitutional dimension as in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985),

⁴ *Minell v. Department of Social Servs. of New York*, 436 U.S. 658, 715 (1978) (Rehnquist, J., dissenting).

⁵ Pound, *supra* note 1, at 6 (emphasis added).

where effective congressional action may be difficult or impossible. Rather, this Court's interpretation of the federal civil rights laws, and section 1981 in particular, is "an area that has seen careful, intense, and sustained congressional attention". *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).

Lastly, nothing in the circumstances of the petitioner's claim in this case could in any event justify overruling *Runyon*. Petitioner's racial harassment claim states a cause of action under section 1981.

ARGUMENT

I. *RUNYON v. McCrary* SHOULD NOT BE OVERRULED

Twelve years ago, our local affiliate, the Washington Lawyers' Committee for Civil Rights Under Law, represented Michael McCrary before this Court. In our brief to this Court in February 1976, we argued that "[t]he court of appeals was plainly correct in holding that plaintiffs' rights guaranteed by 42 U.S.C. Sec. 1981 were violated as a result of the racially discriminatory admission policies of the defendant schools".⁶

Twelve years ago seven members of this Court agreed that section 1981 barred private acts of discrimination, expressing the view that the result in *Runyon* itself followed from "well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes". *Runyon*, 427 U.S. at 175; see also *id.* at 186-89 (Powell, J., concurring); *id.* at 189-92 (Stevens, J., concurring).

In the interim, has anything happened which could or should change the Court's result on solely the *stare decisis* issue, fully litigated in *Runyon* itself? Since 1976, has there been a change in the anti-discrimination "mores of [the] day" that Justice Stevens found to support the result in *Runyon*?⁷ Has

⁶ Brief for the Respondents, *Runyon v. McCrary*, Nos. 75-62, 75-66 and 75-278, p. 13.

⁷ *Runyon*, 427 U.S. at 191 (Stevens, J., concurring) (citing Justice Cardozo).

there been any indication from Congress which would change what Justice Stewart concluded, writing for the Court in *Rumson*: "There could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination"? *Id.* at 174-75.

Each of these questions must be answered flatly and unequivocally no. This Court correctly decided *Rumson* in 1976 and it remains correct today. *Rumson* has become an important part of the fabric of civil rights law enforcement in this country. For *Rumson* to be overruled at this point, it would necessarily be true that "stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact".⁸

That would be a deplorable result. As Justice Cardozo recognized over a half-century ago:

"One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. . . . [T]here shall be adherence to precedent."⁹

Similarly, Justice Harlan, writing for the Court in *Moragne v. State Marine Lines*, 398 U.S. 375 (1970), emphasized the importance of *stare decisis*¹⁰ to an ordered society:

"Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these [is] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise"

Id. at 403.

⁸ Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 743 (1988).

⁹ B. Cardozo, *The Nature of the Judicial Process* 112 (1921).

¹⁰ *Stare decisis* is derived from the Latin phrase *stare decisis et non quasi movere*, which means "let the decision stand and do not disturb things which have been settled". A. Goldberg, *Equal Justice: The Warren Era of the Supreme Court* 74 (1971).

Overruling precedent, especially recent precedent, Professor Archibald Cox wrote, "undermine[s] the belief that judges are not unrestrainedly asserting their individual or collective wills, but following a law which binds them as well as the litigants".¹¹ More recently, Professor Cox concluded:

"The future of judicial review probably depends in good measure on whether the view that law is only policy made by courts carries the day in the legal profession, or whether room is left for the older belief that judges are truly bound by law both as a confining force and as an ideal search for reasoned justice"¹²

Justice Stevens, declining to argue for overruling a prior decision which he believed may have been erroneously decided, summarized:

"Of even greater importance, however, is my concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel."

Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (concurring opinion) (footnotes omitted).

Recently, Judge Posner observed that failure to follow precedent undermined the legitimacy of the federal judiciary by weakening popular acceptance of the force of judicial decisions.¹³ Chief Justice Hughes expressed the same view sixty years ago, stating: "Stability in judicial opinions is of no little importance in maintaining respect for the Court's work".¹⁴

¹¹ A. Cox, *The Role of the Supreme Court in American Government* 50 (1976).

¹² A. Cox, *The Court and the Constitution* 377 (1987).

¹³ Levy, *Posner Portrays Judges as Deciders*, *Harv. L. Rev.*, Nov. 21, 1986, at 5, 13.

¹⁴ C. Hughes, *The Supreme Court of the United States* 53 (1928).

For these reasons, even if a majority of this Court should now conclude that *Rarion* was incorrectly decided, it should not be overruled. As Professor Monaghan wrote:

"Even an 'overriding conviction' of prior error is not enough; the precedent must have some palpable adverse consequences beyond its existence."¹⁵

This basic principle of *stare decisis* should control the result here. First, *Rarion* is not so "contrary to the principles of the law" that it has had "an ill effect upon the process of determining new questions by analogical reasoning."¹⁶ Since *Rarion*, this Court has held repeatedly that section 1981 reaches private conduct, see *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); and in no decision since *Rarion* has any member of this Court suggested that the "precept fixed" by that decision is somehow "contrary to principles of law" or that it has "had an ill effect" upon determining new questions.

Nor, moreover, could this Court reasonably conclude that *Rarion* was "'flatly' unjust in its results,"¹⁷ for *Rarion* is neither inconsistent with related laws nor has it led to unforeseeable, unjust results.¹⁸ The *Rarion* decision upheld "the mores of [its] day". *Id.* at 191 (Stevens, J., concurring) (quoting Jus-

¹⁵ Monaghan, *supra* note 6, at 758 (quoting Pound, *supra* note 1, at 6). Similarly, Professor Maltz noted:

"[R]eaching . . . a conclusion that a prior case is erroneous is only the first step in deciding to override that case. In making the decision, the justice must be sensitive to the tangible and intangible problems involved when a precedent is abandoned. Only if these problems are outweighed by the benefits to be derived from the new doctrine to be adopted should the Court abandon *stare decisis* in a particular case."

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 493 (footnote omitted).

¹⁶ Pound, *supra* note 1, at 6.

¹⁷ *Id.*

¹⁸ For example, section 1981 overlaps largely with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), although the two statutes differ in both scope and application. Title VII prohibits

tice Cardozo). *Rarion* remains completely consistent with the mores of the present day which find racial discrimination abhorrent. When presented with the issue, every Justice on this Court has joined opinions affirming *Rarion*'s holding that section 1981 affords a remedy against private acts of racially motivated discrimination.¹⁹ For example, writing for a unanimous Court in *Saint Francis College*, Justice White stated:

"[T]he Court has construed [section 1981] to forbid all 'racial' discrimination in the making of private as well as public contracts. The petitioner college, although a private institution, was therefore subject to this statutory command."

Id. at 2026 (citation omitted).

A "'flatly' unjust" result is not merely one which a majority of the Court now may believe is "clearly wrong" or that it "very much dislikes".²⁰ The majority and dissent in *Rarion* disagreed strongly over the legislative history of section 1981. However, whether the majority was correct in its

employment discrimination based on race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2, while section 1981 prohibits only discrimination based on race or color, *Saint Francis College*, 107 S. Ct. at 2028. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975) (comparing section 1981 and title VII); Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 Duke L.J. 1223, 1230-31 (same). Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII liability may be predicated upon disproportionate impact) with *General Bldg. Contractors Ass'n*, 458 U.S. 375 (section 1981 liability requires proof of discriminatory intent).

¹⁹ See *Goodman*, 107 S. Ct. at 2622-23, 2625 (employer's intentional racially discriminatory treatment of employees violated section 1981; union's refusal to file grievances for victims of racial harassment violated section 1981); *Saint Francis College*, 107 S. Ct. at 2026-28 (section 1981 protects against intentional discrimination motivated by ethnic characteristics or ancestry; Arab has remedy against employer); *General Bldg. Contractors Ass'n*, 458 U.S. at 391 (proof of intentional discrimination required to impose section 1981 liability); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 653 (1979) (White, J., concurring) ("[sections 1981 and 1982] remained a declaration of rights that all citizens in the country were to have against each other, as well as against their Government"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976) (section 1981 applies to racial discrimination in private employment against white persons).

²⁰ Monaghan, *supra* note 6, at 760, 762.

historical interpretation twelve years ago does not determine this Court's decision today, especially given this Court's clear line of subsequent decisions affirming *Runyon's* interpretation of section 1981.²¹ In sum, the "exceptional action of overruling"²² cannot be predicated on incorrectness.²³

Beyond the general considerations weighing against overruling precedent, special considerations have guided this Court when it has reconsidered statutory interpretation. These special considerations are premised upon Congress' ability to correct interpretations it considers in error. Chief Justice Rehnquist, writing for the Court in *Oklahoma City v. Tuttle*, 471 U.S. 808, 818-19 n.5 (1985), observed that where this Court's "decision is subject to correction by Congress, we do a great disservice when we subvert these concerns [of *stare decisis*] and maintain the law in a state of flux".²⁴

21 Even in constitutional cases, where this Court has suggested the constraints of *stare decisis* are more easily overcome, ambiguous historical evidence has not been sufficient to provide the "special justification" required for a departure from *stare decisis*. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941, 2956-57 (1987) (discussing the force of Justice Brennan's historical arguments for a re-interpretation of the Eleventh Amendment cases); *Papayan v. Allain*, 478 U.S. 265 (1986); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 n.3 (1985). *A fortiori*, where the constraints of *stare decisis* are more severe, such as with statutory precedent, historical evidence of contrary intent alone cannot suffice as "special justification".

22 *Rumsay*, 467 U.S. at 212.

23 Chief Justice Marshall acknowledged this principle when he noted that only the combination of several factors warranted overruling: "Although [the prior] case was decided by a divided court, and although we think, that upon the true construction of the . . . act . . . [the prior case was wrongly decided], we should be much inclined to adhere to the decision . . . had not a contrary practice since prevailed." *Gordon v. Ogden*, 28 U.S. (3 Pet.) 32, 34 (1830).

24 See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (White, J., writing for the Court) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *United States v. South Buffalo R.R. Co.*, 333 U.S. 771, 774-75 (1948) (Jackson, J., writing for the Court) ("[W]hen the questions are of statutory construction, . . . Congress can rectify our mistake . . . and in these circumstances reversal is not readily to be made") (citation omitted); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 60 (1977) (White,

This Court recently reviewed a Second Circuit decision in which Judge Friendly suggested that a 60 year-old Supreme Court precedent, upon which he based the Second Circuit's decision, might be overruled in light of subsequent developments. Justice Stevens, writing for the Court, declined to do so:

"We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: '*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.' *We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention.* If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."

Square D, 476 U.S. at 424 (footnotes omitted) (emphasis added).

Over the past two decades, this Court's interpretation of the federal civil rights laws generally, and this Court's interpretation of section 1981 specifically, is "an area that has seen

J., concurring in judgment) ("[C]onsiderations of *stare decisis* are to be given particularly strong weight in the area of statutory construction"); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 641 (1983) (Stevens, J., dissenting) ("If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress"); *Monell*, 436 U.S. at 714-15 (Rehnquist, J., dissenting) ("In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit"); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) ("[A]ny subsequent 'reinterpretation' . . . is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute").

careful, intense, and sustained congressional attention". *Id.* Congress' recent passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), was in direct response to this Court's interpretation of Title IX of the Education Amendments of 1972 in *Grove City College v. Bell*, 465 U.S. 555 (1984).²⁵ Similarly, in 1982 Congress amended section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to restore the legal standard that had governed voting discrimination cases prior to this Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion).²⁶ And in 1978 Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), responding to this Court's interpretation of Title VII of the Civil Rights Act of 1964 in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976).²⁷

²⁵ In *Grove City*, this Court held that the non-discrimination provisions of Title IX could be applied only to the particular program or activity actually receiving federal financial assistance, not to the recipient institution as a whole. Given the similarity of the language and legislative history of other statutes barring discrimination in federal financial assistance, *Id.* at 566, Congress acted to correct the Court's interpretation as it might apply to each of these statutes. The Civil Rights Restoration Act stated that "recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964" and that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered". Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988).

²⁶ In *Bolden*, this Court held that a challenge to an electoral system under section 2 of the Voting Rights Act must demonstrate purposeful racial discrimination. 446 U.S. at 62-65. Congress' amendment to the statute corrected this interpretation. Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982), codified as amended at 42 U.S.C. § 1973 (1982). The Senate Judiciary Committee explicitly rejected this Court's reading, stating it found no persuasive evidence to support the Court's argument that the 15th Amendment and the 1965 Voting Rights Act made proof of discriminatory purpose an essential requirement of section 2 when it was first enacted. *Voting Rights Act Amendments of 1982*, S. Rep. No. 417, 97th Cong., 2d Sess. 15-16, reprinted in 1982 U.S. Code Cong. & Admin. News 192-93.

²⁷ Finding that an employer's disability plan which excluded sickness and accident benefits connected with disabilities arising from pregnancy did not violate Title VII, this Court held "gender-based discrimination

In each case, when Congress considered this Court's interpretation of a federal civil right statute to be incorrect, it acted to change that interpretation. In sharp contrast, Congress has repeatedly acknowledged the correctness of the *Rumyon* result.

Prior to *Rumyon*, Congress specifically affirmed the vitality of section 1981 as applied to private acts of discrimination. As noted in *Rumyon*, this Court had acknowledged as early as 1968 that section 1981 applied to private acts of discrimination. 427 U.S. at 168 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968)). It was in light of this interpretation that Congress, in 1972, specifically rejected an amendment offered by Senator Hruska to the Equal Employment Opportunities Act that would have consolidated all anti-discrimination remedies under Title VII. 118 Cong. Rec. 3368-70 (1972). Opposing this amendment, Senator Williams stated that the proposed improvements in the enforcement machinery and coverage of Title VII were "premised on the continued existence and vitality of other remedies for employment discrimination". *Id.* at 3371. Senator Williams also observed that:

"[The] right of individuals to bring suits in Federal courts to redress individual acts of discrimination . . . was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Act of 1866 and 1871 are not mutually exclusive and must be read together to provide alternative means to redress individual grievances."

Id.

does not result simply because an employer's disability-benefits plan is less than all-inclusive". *General Electric*, 429 U.S. at 138-39. In 1978, Congress rejected this interpretation, and amended Title VII "to clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment". *Pregnancy Discrimination Act of 1978*, H.R. Rep. No. 948, 95th Cong., 1st Sess. 2, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4750. Concerned that the "Supreme Court's narrow interpretations of Title VII [would] tend to erode our national policy of nondiscrimination in employment", *Id.* at 4751, Congress clarified its objective through statutory amendment.

Additionally, in the House Education and Labor Committee's report on the Equal Employment Opportunities Act, the Committee explicitly affirmed the results of recent circuit court decisions which had held that "remedies available to an individual under Title VII are coextensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive". *Equal Employment Opportunities Enforcement Act of 1971*, H.R. Rep. No. 238, 92d Cong., 2d Sess. 19, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2154. Congress' rejection of the proposal to consolidate anti-discrimination remedies under Title VII was unanimously relied upon by this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *id.* at 468 (Marshall, Douglas, and Brennan, JJ., concurring on this point); and also in *Runyon*:

"There could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination."

427 U.S. at 174-75.²⁸

Congress has taken no action to correct this Court's interpretation of section 1981 in *Runyon*. Instead, Congress has relied on this interpretation. Congressional reliance on the *Runyon* result is clearly evidenced by 1976 legislation authorizing the award of attorney's fees in section 1981 cases, legislation enacted just four months after *Runyon* was decided.²⁹ Acknowledging that civil rights laws "depend heavily upon

²⁸ Section 1981 complements other statutory causes of action, particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* While both Title VII and section 1981 address employment discrimination, *see supra* note 18, section 1981 significantly differs in that it applies, as in *Runyon*, to contracts which do not concern employment and it enables victims of discrimination to recover compensatory and, in egregious circumstances, punitive damages. *See Johnson*, 421 U.S. at 460-61. In contrast, Title VII damage recovery is limited to awards of back pay. As this Court concluded in *Johnson*: "The remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461.

²⁹ *Runyon* was decided on June 25, 1976; the Civil Rights Attorney's Fees Award Act of 1976 was enacted on October 19, 1976.

private enforcement" and fee awards are "an essential remedy" to allow private citizens "a meaningful opportunity to vindicate the important Congressional policies which these laws contain", *Civil Rights Attorney's Fees Award Act of 1976*, S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5900, 5910, Congress specifically amended the Civil Rights Act of 1866 to include a provision for fee awards, *Civil Rights Attorney's Fees Awards Act of 1976*, Pub. L. No. 94-559, 42 U.S.C. § 1988.³⁰ In passing the Act, Congress explicitly relied upon the fact that "section 1981 is frequently used to challenge employment discrimination based on race or color". *Civil Rights Attorney's Fees Award Act of 1976*, H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976) (citing *Johnson and McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)). Congress also relied upon the use of section 1981 as a remedy against racially exclusionary policies in recreational facilities, as this Court had earlier recognized in *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4. The Senate Report, noting the interrelationship between promoting civil rights and granting fee awards, flatly stated that "[i]n the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the [law's] goals". S. Rep.

³⁰ The Act was passed in response to this Court's holding in *Allyce Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), that federal courts had no discretion to award attorney's fees to prevailing plaintiffs, absent statutory authorization. Congress acted quickly to eliminate the inconsistent situation that allowed an award of attorney's fees in an employment discrimination suit brought under Title VII, but denied such an award in a similar suit brought under section 1981. As the Senate Report pointed out:

"*Allyce* . . . created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Allyce*, suddenly unavailable in the most fundamental civil rights case. For instance, fees are now authorized in an employment discrimination suit under Title VII . . . but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action."

Civil Rights Attorney's Fees Award Act of 1976, S. Rep. No. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Admin. News 5900, 5910.

No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News at 5910.

The foregoing provides the context for assessing the statement in the Court's *per curiam* opinion in this case that "we have explicitly overruled statutory precedents in a host of cases". *Patterson*, 108 S. Ct. at 1420. Certainly there are cases where *stare decisis* has not been given effect, even with respect to statutory precedent. However, a review of each of the cases cited in the Court's *per curiam* opinion on this point strongly suggests that they rest on very different footing from this case: in each case cited, there was "special justification" for departure from precedent; there was not the congressional attention to, agreement with, and support of, the precedent as is so demonstrably present here; those cases did not involve sharp departure from the mores of their day; they did not produce "flatly unjust" results; none overruled recent precedent which itself was explicitly based upon *stare decisis*; none involved overruling precedent recognizing or affirming a substantive statutory right; and none carried the tremendous threat of harm to many pending cases and to the future enforcement of civil rights under law.

(i) By overruling *Monroe v. Pape*, 365 U.S. 167 (1961), in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), this Court returned consistency to the law regarding the liability of local governments for civil rights violations. The immunity from section 1983 liability that *Monroe* had granted municipal corporations conflicted with decisions imposing section 1983 liability on school boards.³¹ Unlike *Monroe*, *Ranyn* is consistent both with prior and subsequent decisions. In *Jones*, 392 U.S. at 441-43 n.78, this Court had interpreted section 1981 as barring racial discrimination in the making and enforcement of contracts. Subsequently, the Court banned racial exclusivity in the membership and guest policy of a private neighborhood swimming club under sections 1981 and 1982, *Tillman*, 410 U.S. at 439-40, and the Court unanimously concluded in *Johnson* that "[section] 1981 affords a federal remedy against discrimination in private employment on the basis of race".

³¹ See *Monell*, 436 U.S. at 663 n.5 (citing school board cases).

421 U.S. at 459-60; *Id.* at 468 (Marshall, Douglas, and Brennan, JJ., concurring on this point). Furthermore, as Justice Stevens noted, concurring in *Ranyn*, Congress had formulated a policy of "eliminating racial segregation in all sectors of society", and "[t]his Court has given a sympathetic and liberal construction" to the legislation directed at racial discrimination. 427 U.S. at 191. It would have been inconsistent, Justice Stevens concluded, for the Court to have decided *Ranyn* differently in light of congressional policy and Supreme Court precedent. *Id.* at 191-92.

(ii) In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), this Court overruled *Internacional Union, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), recognizing that its previous interpretation of the Wagner Act and Taft-Hartley Act had been undermined by subsequent decisions and now operated to frustrate national labor policy. Similarly, this Court overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 254-55 (1970), on the grounds that *Sinclair's* holding frustrated the peaceful settlement of labor disputes and constituted a significant departure from the consistent emphasis on arbitration. *Ranyn*, however, does not frustrate but rather furthers congressional policy against racial discrimination, and its holding has not been weakened but rather bolstered by subsequent decisions.

(iii) In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court overruled its earlier interpretation of section 1 of the Sherman Act in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court in *Continental T.V.* overruled precedent which was "itself . . . an abrupt and largely unexplained departure" from the law in the antitrust area, which the lower courts had "sought to limit". *Id.* at 47-48. *Ranyn*, in contrast, is consistent with other anti-discrimination laws.

(iv) This Court overruled *Ahrens v. Clark*, 335 U.S. 188 (1948), in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), because the strict territorial limit *Ahrens* imposed on the filing of habeas corpus petitions had been un-

dermined both by congressional amendments to the habeas corpus statute and by subsequent decisions of this Court.

(v) In *Peyton v. Rowe*, 391 U.S. 54 (1968), the Court overruled the prematurity rule of *McNally v. Hill*, 293 U.S. 131 (1934), and held that a prisoner serving consecutive sentences may challenge sentences he had not yet begun to serve. The *Peyton* Court concluded that the holding in *McNally* "undermine[d] the character of the writ of habeas corpus", and that the reasoning in *McNally* was "inconsistent" with subsequent decisions of the Court. 391 U.S. at 63-64. Similarly, this Court overruled *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), because congressional modifications to the arbitration procedures of the Railway Labor Act and subsequent decisions of this Court making arbitration a compulsory remedy contradicted *Moore's* holding.

In sum, by overruling precedent in these cases this Court enhanced the consistency and fairness of the law. That conclusion could not follow from a decision to overrule *Ryanon*.

II. PETITIONER'S RACIAL DISCRIMINATION CLAIM DOES NOT CALL FOR A FUNDAMENTAL EXTENSION OF LIABILITY UNDER SECTION 1981

The Court's *per curiam* opinion stated that the decision to reconsider *Ryanon* was based on "the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981". *Patterson*, 108 S. Ct. at 1420. Respectfully, petitioner's argument does not call for a "fundamental extension" of section 1981 liability. The right to be free from racial harassment in the performance of an employment contract is an essential element of the right to make and enforce contracts free from racial discrimination.

Racial harassment has long been recognized as a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). See, e.g., *Firefighters Int. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom. Banta v. United States*,

434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir.1976).³²

Victims of racial harassment, however, derive little practical benefit under Title VII. Unlike section 1981, Title VII remedies are limited to back pay, 42 U.S.C. § 2000e-5(g); this is an illusory remedy for a plaintiff who has not been fired or denied promotion. Section 1981, in contrast, provides real relief for victims of racial harassment³³ in the form of compensatory and punitive damages.³⁴

³² Citing these cases, this Court in *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2405 (1986), unanimously relied upon Title VII's prohibition against racial harassment in recognizing similar protections against sexual harassment.

³³ See, e.g., *Young v. I.T.A.T. Co.*, 438 F.2d 757, 758 (3d Cir. 1971) (recognizing section 1981 claim where plaintiff was "harassed . . . both maliciously and wantonly"); *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1385 (N.D. Cal. 1987) (allowing damages under section 1981 upon a finding, *inter alia*, of a "racially discriminatory atmosphere within the company").

³⁴ *Johnson*, 421 U.S. at 440 ("An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."). In both *Johnson*, 421 U.S. at 455, and *Goodman*, 107 S. Ct. at 2620, plaintiffs raised claims including racial harassment and discrimination in the terms and conditions of employment. In neither case did this Court suggest that such claims were beyond the scope of section 1981.

CONCLUSION

For all these reasons, the Court's decision in *Rumson v. McCrary* should not be overruled.

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

—v.—

McCLEEN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER SUBMITTED
BY THE CENTER FOR CONSTITUTIONAL RIGHTS, THE CENTER
FOR LAW & SOCIAL JUSTICE, THE NATIONAL CONFERENCE OF
BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, TOWARD A
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CONSENT OF THE PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Petitioner. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The thirty-nine organizations, groups, and individuals joining in this brief amici curiae (see appendix) represent many segments of American society with diverse interests. They share a mutual concern that the Court will use the instant case to reaffirm its and this nation's commitment to rid our society of the haunting spectres of racial discrimination and hatred.

PRELIMINARY STATEMENT

On April 25, 1988, this Court restored to the calendar for reargument the case of Patterson v. McClean Credit Union, No. 87-107. The Court asked that the parties consider and brief the following question:

"Whether or not the interpretation of 42 U.S.C. § 1981 adopted . . . in Burton v. McGary, 427 U.S. 160 (1976), should be reconsidered."

As originally briefed and argued,

Patterson involved the sole legal question whether § 1981 encompassed a claim of racial discrimination in the terms and conditions of employment, including a claim that the petitioner was harassed because of her race. The holding of this Court in *Bunyon* -- that § 1981 "reaches private conduct," 427 U.S. at 173 -- undergirds the claim asserted in *Patterson* and is essential to the protection of the freedoms conferred by the thirteenth amendment and by Congress through the Civil Rights Act of 1866. A decision to overrule that holding would constitute a grave step backward in the struggle for racial equality and would disrupt the stability of cherished rights long secured.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the original ratification of the United States Constitution in 1787, to the

enactment of the thirteenth amendment in 1865, the "peculiar institution" of American slavery has remained undefined by the document that initially endorsed, or at least tolerated its existence, and that eventually eradicated it. Throughout history, the inability and, perhaps, unwillingness of those entrusted with the interpretation of the legal pronouncements abolishing that institution to honestly assess both the nature of American slavery and the meaning of its abolition have unnecessarily and unjustly retarded the growth of those fundamental freedoms essential to a civilized society.¹

¹ See Kinoy, *The Constitutional Right of Negro Freedom*, 21 Rutgers L. Rev. 387 (1967); cf. A. L. Higginbotham, In the Matter of Color 6-7 (1st ed. 1978) ("[F]or black Americans today . . . the early failure of the nation's founders and their constitutional heirs to share the legacy of freedom with black Americans is at least one factor in America's perpetual racial

Moreover, the mechanical interpretations in the post-Reconstruction era² of the Civil War Amendments operated to undermine the concepts of dignity and justice that have been lauded as the true embodiment of the Constitution.

What follows is amici's attempt to persuade the Court not to recreate the obstacles that resulted in the virtual burial in the post-Reconstruction era of the Civil War Amendments and legislation enacted pursuant thereto. The central thrust of our argument is that the

tensions."); Kinoy, Jones v. Alfred H. Mayer Co., An Historic Step Forward, 22 Vand. L. Rev. 475, 476-77 (1969) (same).

² As noted historian, Eric Foner, recently explained, "Reconstruction was not merely a specific time period, but the beginning of an extended historical process: the adjustment of American society to the end of slavery." E. Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at xxvii (1988).

thirteenth amendment unequivocally authorizes Congressional regulation of private discriminatory conduct. Such is evidenced by the legislative debates on the Amendment and, more recently, by this Court's seminal decision in Jones v. Alfred H. Mayer Co.³ Moreover, those debates, the reality of slavery and the national commitment to eradicate its vestiges, all indicate that the ground upon which members of this Court have based reconsideration of Rumson -- "the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981"⁴ -- is infirm. Finally, lest we return to the post-Reconstruction Plessy v.

³ 392 U.S. 409 (1968).

⁴ Patterson v. McClean Credit Union, No. 87-107, slip op. at 1 (U.S. April 25, 1988) (per curiam) (emphasis added).

Ferguson⁵ and Civil Rights Cases of 1883⁶
 ere, amici urge this Court to reaffirm §
 1981's reach to private discrimination and
 to find that racial discrimination in the
 terms and conditions of employment,
 including racial harassment, states a
 cognizable claim under § 1981.

ARGUMENT

I. THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROSCRIBES PRIVATE DISCRIMINATION.

A. The Legislative History of the Thirteenth Amendment Confirms Congress's Overarching Intent to Eradicate Slavery and its Incidents

The thirteenth amendment⁷ to the United

⁵ 163 U.S. 537 (1896).

⁶ 109 U.S. 3 (1883).

⁷ Section one of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place

States Constitution, abolishing slavery and securing universal freedom, was enacted in 1865 amid sectional strife and socio-political controversy.⁸ The issuance of the Emancipation Proclamation three years prior was deemed by many an inadequate measure to secure the freedom of the Black race.⁹ The geographical and political

subject to their jurisdiction." U.S. Const., Amendment 13, § 1 (1865). Section two confers upon Congress the "power to enforce this article by appropriate legislation." *Id.* at § 2.

⁸ Debates around the Thirteenth Amendment commenced in the spring of 1864 just prior to the official end of the Civil War.

⁹ See, e.g., Cong. Globe 38th Cong., 1st Sess. 1314 (1864) (Remarks of Senator Trumbull [R., Ill.]) (" . . . any and all these laws and proclamations, giving to each the largest effect claimed by its friends, are ineffectual to the destruction of slavery"); *id.* at 1324 (Remarks of Senator Wilson [R., Mass.]) (noting that notwithstanding the Emancipation Proclamation, the thirteenth amendment was necessary to "make impossible forevermore the reappearing of the discarded slave

limitations of President Lincoln's manumission fell far short of the needed destruction of the entire system of chattel slavery. Recognizing that "none of the acts hostile to slavery . . . [at the time of the debates] ha[d] gone beyond the fact of making men affected by them free; that no one of them . . . reached the root of slavery and prepared for the destruction of the system,"¹⁰ Representative Wilson, on the floor of the House of Representatives, implored his colleagues to "assert the ultimate triumph of liberty over slavery,

system, and the returning of the despotism of the slavenasters' domination."). See also Buchanan, The Quest For Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 7 (1974).

Indeed, well before 1863 it was generally conceded, even by proslavery forces, that "the disintegration of slavery had begun." E. Foner, *supra* note 2, at 3, 8.

¹⁰ Cong. Globe, 38th Cong., 1st Sess. 1203 (1864).

democracy over aristocracy, free government over absolutism,"¹¹ by passing the thirteenth amendment.

The concern for the plight of all Blacks -- whether slaves in the South or free in the North -- was paramount to antislavery forces within the Congress. The horrors of the "hapless bondsman"¹² were universally known. Abolitionist Congressmen also knew, however, that the freedman of the North "was only less degraded, spurned, and restricted than his enslaved fellow. He bore all the burdens, badges and indicia of slavery save only the technical one."¹³ Thus, according to its

¹¹ *Id.* at 1204.

¹² *Id.* at 1324.

¹³ tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171, 179 (1951). For a discussion of the

strongest proponents, the thirteenth amendment was necessary to ensure enduring, universal freedom and to create a fundamental, national right to liberty, equality, and dignity for all.

Congress did not confine its vision of universal freedom to members of the Black race; it was to extend to all of humanity within the jurisdiction of the United

status of Blacks in the antebellum North, see J. Franklin, *From Slavery to Freedom* 151-64 (1965). In addition to the concern for the liberties of the freedman, the relationship of the federal government to the states was a major theme discussed during the debates. See *id.* at 174-77. Opponents to the thirteenth amendment argued that the sovereignty of the states was sacrosanct and that the Amendment proposed "a revolutionary change in the Government" that "essentially repudiate[d] the principle upon which the Union was formed." Cong. Globe, 38th Cong., 1st Sess. 2986 (1864) (Remarks of Representative Kelley [R., Pa]).

States.¹⁴ In an effort to define this new humanity for future generations, Congress turned to the inhumanity perpetrated against the slaves for over two hundred years and pledged that never again would any group or individual be subject to such inhumane treatment within the jurisdiction of the Constitution.

Central to the concept of freedom envisioned by antislavery members of the 38th Congress was the "obliteration of] the last lingering vestiges of the slave system." (Remarks of Representative Wilson,

¹⁴ See Kinoy, *supra* note 1, 21 Rutgers L. Rev. at 389-90. See also The Civil Rights Cases of 1881, 109 U.S. at 37 (Harlan, J., dissenting) ("The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States."); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72 (1873) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.").

[R., Ill.]]. In turn, at the heart of the obliteration of the vestiges of slavery was, at a minimum, the total renunciation of the notorious opinion of Chief Justice Roger Taney in Dred Scott v. Sandford¹⁵ in which Taney declared:

at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [the black race were] regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.¹⁶

The goal of Congress to overrule Dred

¹⁵ 60 U.S. (19 How.) 393 (1856). For reference to the attempt of rebel states to "promulgate the Dred Scott decision," see, Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (Remarks of Senator Wilson [R., Ill.]). Senator Wilson challenged "anti-slavery men of united America . . . [to] seize the first, the last, and every occasion to trample down and stamp out every vestige of slavery." *Id.* at 1324.

¹⁶ 60 U.S. at 407.

Scott with the enactment of the thirteenth amendment is manifested both by specific reference to the decision and by forceful expressions to restore the authority and integrity of the Constitution.¹⁷ Senator Trumbull and Representative Wilson charitably described the framers of the Constitution as men of good will who uniformly deplored the horrors of slavery.¹⁸

¹⁷ See also Civil Rights Cases of 1881, 109 U.S. at 37 (Harlan, J., dissenting) (noting that the Civil Rights Act of 1866, enacted pursuant to the thirteenth amendment and prior to the adoption of the fourteenth, conferred national citizenship upon the Black race); United States v. Cruikshank, 25 F.Cas. 707, 711 (No. 14,897) (C.C.D. La. 1874) (discussing the necessity of the legislative reversal of Dred Scott decision) (Bradley, J.), *aff'd*, 92 U.S. 542 (1875).

¹⁸ Representative Wilson maintained that the framers "believed in the incompatibility of slavery with a free Government; but they regarded the latter to be the stronger, not yet having had the experience with slavery as a political power." Cong. Globe, 38th Cong., 1st Sess.

Under this view, the framers "looked forward to the not distant, nor as they supposed uncertain period when slavery should be abolished, and the Government become in fact, what they made it in name, one securing the blessings of liberty to all."¹⁹ Restoration of the mandates of the

1200 (1864). Similarly, Senator Trumbull declared:

Our fathers who made the Constitution regarded [slavery] . . . as an evil, and looked forward to its early extinction. They felt the inconsistency of their position, while proclaiming the equal rights of all to life, liberty, and happiness, they denied liberty, happiness, and life itself to a whole race, except in subordination to them.

Id. at 1313.

¹⁹ Cong. Globe, 38th Cong., 1st Sess. 1313 (1864) (Remarks of Senator Trumbull [R., Ill.]) (emphasis added).

Constitution could be achieved only by extending its protections and guarantees as originally conceived to the Black race.²⁰

Thus, the thirteenth amendment was intended to effect not only the immediate emancipation of the slaves, but the liberation of the nation. The passage of the Amendment conferred upon Congress a "constitutional mandate to enforce . . . not just the liberty of blacks but the liberty of the whites as well and included not just freedom from personal bondage but

²⁰ As expressed by Senator Charles Sumner:

It is only necessary to carry the Republic back to its baptismal vows, and the declared sentiments of its origin. There is the Declaration of Independence: let its solemn promises be redeemed. There is the Constitution: let it speak, according to the promises of the Declaration.

Cong. Globe, 38th Cong., 1st Sess. 1492 (1864).

protection in a wide range of natural and constitutional rights."²¹

That the intent of the thirteenth amendment was to reach private conduct cannot be denied. As poignantly stated by Representative Wilson:

Slavery is defined to be "the state of entire subjugation of one person to the will of another." This is despotism, pure and simple. It is true that this definition concerns more the relations existing between master and slave than it does those between the system of slavery and the government. But we need not hope to find a system purely despotic acting in harmony with a Government wholly, or even partially, republican. An antagonism exists between the two which can never be reconciled.²²

To be certain, support for broad legislative authority to effectuate the

²¹ tenBroek, *supra* note 12, at 183.

²² Cong. Globe, 38th Cong., 1st Sess. 1200 (1864) (Remarks of Rep. Wilson [R., Iowa]) (emphasis added).

mandate of universal freedom was not unanimous.²³ The 38th Congress, however, well aware of the various interpretations urged by opponents and proponents alike, nonetheless enacted the thirteenth amendment. Neither subsequent doubts, ambivalence, nor actual regret by a handful of Congressmen with respect to the potential breadth of the thirteenth amendment as enacted operates to eviscerate the freedoms embodied therein at its inception.

B. The Precedents of This Court Soundly Establish the Reach of the Thirteenth Amendment to Private Discriminatory Conduct

As early as 1873,²⁴ judicial

²³ Nor has any legislative measure, *amici* will venture to assert, ever garnered either the unanimous consent or understanding of its terms and effects from both Houses of Congress.

²⁴ The first judicial encounters with the thirteenth amendment after its ratification in 1865 were generally by

interpretations of the thirteenth amendment in this Court reaffirmed the sentiment of the Reconstruction Congress by recognizing the amendment as a "grand yet simple declaration of personal freedom of all the human race within the jurisdiction of this government" ²⁵ Ten years later, in the Civil Rights Cases of 1883, this Court noted that the scope of the thirteenth amendment was not restricted to the mere emancipation of the slaves. "By its own unaided force and effect it abolished

Supreme Court justices on circuit duty in the lower federal courts. At least one commentator has concluded that "most of the circuit decisions by Supreme Court justices gave expansive readings to the thirteenth amendment" Buchanan, *supra* note 9, 12 *Howe. L. Rev.* at 358. Although none of those decisions were ever adopted by a majority of the Court, *see id.*, they provide some indication of a broader view of the amendment shortly after its ratification.

²⁵ Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 69 (1872).

slavery, and established universal freedom."²⁶ Under the thirteenth amendment, Congress was authorized to pass legislation "so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude . . . [l]egislation that could] be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."²⁷

Thus, although the power of Congress to enact legislation to enforce the thirteenth amendment was clear, the historic debate in the Civil Rights Cases of 1883 concerned the scope of that power in terms of defining the badges and incidents of slavery. While Justice Bradley, for the majority, expressed a restrictive view of

²⁶ 109 U.S. at 20.

²⁷ *Id.* (emphasis added).

Congress's power, the first Justice Harlan, in dissent, urged a more expansive reading:

[S]ince slavery, as the court has repeatedly declared was the moving or principal cause of the adoption of [the thirteenth] amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them because of their race; in respect of such civil rights as belong to freemen of other races.²⁸

Against this background, Justice Harlan concluded that discrimination against Blacks solely on account of race imposed a badge of servitude in conflict with the universal freedom guaranteed by the thirteenth amendment.²⁹

After the decision in the Civil Rights

²⁸ 109 U.S. at 40 (Harlan, J., dissenting).

²⁹ *Id.*

Cases of 1881³⁰, the thirteenth amendment was, in effect, abandoned as a constitutional mandate.³¹ Eighty-five

³⁰ Although the Court in the Civil Rights Cases unanimously recognized the power of Congress to define and legislate against badges and incidents of slavery, see 109 U.S. at 35 (Harlan, J., dissenting), a majority rejected Congress's attempt to exercise its power through legislation proscribing racial discrimination in public accommodations and amusements. Thus, while the Court adopted a broad theoretical view of Congressional power under the amendment, it in fact undermined that power by narrowly interpreting "badges and incidents of slavery" to exclude racial discrimination and segregation. *Id.* at 22-24.

³¹ For a collection of cases in which the Thirteenth Amendment was narrowly construed, if applied at all, see Buchanan, SUPRA note 9, 12 Moos. L. Rev. at 593-97.

The pinnacle of judicial repression of the Thirteenth Amendment and the attendant enasculation of the freedoms secured thereby came in the 1896 decision in Plessy v. Ferguson, 163 U.S. 537 (1896). Finding the inapplicability of the Thirteenth Amendment to segregation legislation "too clear for argument," the Plessy Court observed that while "[s]lavery implies involuntary servitude, -- a state of bondage[,] . . . [a] statute [requiring

years later, the first Justice Harlan's dissenting opinion in the Civil Rights Cases of 1883 was reasserted in force in this Court's opinion in Jones v. Alfred H. Mayer Co., supra. In Jones this Court resurrected the thirteenth amendment and reaffirmed Congressional power to enact legislation to enforce its goals. At issue in Jones was the refusal by private individuals to sell a home to the Joneses solely because they were Black. Writing for the Court,³² Justice Stewart found that the language of the statute "[o]n its face" prohibited all racial discrimination in the sale or rental of property.³³ Examining

separate but equal accommodations) has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." Id. at 542.

³² Only two justices dissented from the decision in Jones.

³³ 392 U.S. at 421.

the origins of 42 U.S.C. § 1982, which also grew out of the Civil Rights Act of 1866, the Court next conducted an exhaustive review of the legislative history and found clear confirmation of its reading of the statute.³⁴ Rejecting the argument that Congress sought only to eliminate discriminatory laws, Justice Stewart concluded that Congress plainly intended "to secure . . . [the] right[s] protected by § 1982] against interference from any source whatever, whether governmental or private."³⁵ Looking then to the constitutional authority for such legislation the Court held that "Congress has the power under the thirteenth amendment rationally to determine what are the badges and the incidents of slavery,

³⁴ Id. at 422-37.

³⁵ Id. at 424.

and the authority to translate that determination into effective legislation.³⁶

The Jones Court's conclusions, both statutory and constitutional, were undoubtedly prudent, fair and right.³⁷

³⁶ Id. at 440.

³⁷ The Civil Rights Cases of 1883 unanimously and unambiguously established the authority of Congress under the thirteenth amendment to enact direct and primary legislation reaching the discriminatory conduct of private actors. See 109 U.S. at 30, 39. The Jones Court properly concluded that § 1982 was an appropriate exercise of that authority to eradicate the badges and incidents of slavery.

The magnitude of the Jones Court's resurrection of the thirteenth amendment cannot be diminished. One commentator has accurately described Jones as "[r]ivaling Brown (v. Board of Educ., 347 U.S. 483 (1954)) in historical import" Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019 (1969). See generally Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company, 22 Rutgers L. Rev. 537, 539-43 (1968).

The dissent's recital of contrary legislative intent³⁸ suggests, at best, spirited debate around an important piece of legislation. Indeed, the second Justice Harlan's assertion that a reading of the legislative history of the Civil Rights Act of 1866 demonstrates that "a contrary conclusion may equally well be drawn,"³⁹ is hardly a riveting indictment of the Court's reasoning. Even if one assumes that Congress's intent was hopelessly ambiguous, it does not follow that the Court's interpretation of § 1982 is either unsupported or insupportable.

The Jones Court legitimately construed

³⁸ The central thrust of the Jones dissent is that the Civil Rights Act of 1866, from which § 1982 emanates, was designed to remove only legal disabilities in the sale or rental of property. See 392 U.S. at 452-54 (Harlan, J., dissenting).

³⁹ Jones, 392 U.S. at 455 (Harlan, J., dissenting) (emphasis added).

§ 1982's provisions to reach "modern manifestations of racial discrimination,"⁴⁰ and thus to effectuate the clear purposes of the Amendment under which it was promulgated. To have done otherwise would have deprived the statute "of all functional utility in today's society. Unless a statute's language and legislative history plainly require it, [however, it] . . . should not be construed into practical impotence."⁴¹ The majority approach in Jones reflects the fundamental and historic understanding of this Court as expressed by Chief Justice John Marshall in McCulloch v. Maryland⁴², that "[the] constitution [is] intended to endure for ages to come, and,

⁴⁰ Buchanan, supra note 9, 12 Hous. L. Rev. at 848.

⁴¹ Id.

⁴² 17 U.S. (4 Wheat.) 316 (1819).

consequently, to be adapted to the various crises of human affairs."⁴³

With respect to Jones's constitutional conclusion, it was both static and dynamic: Jones merely restates what even the majority of the Court in the Civil Rights Cases of 1883 was required to concede -- that Congress was empowered by the thirteenth amendment to enact legislation to eradicate the lingering badges and incidents of slavery, whether publicly or privately imposed. But Jones also represents an approval of broad Congressional definitions of the badges and incidents of slavery.⁴⁴

⁴³ Id. at 415.

⁴⁴ Under Jones the authority of Congress to define badges and incidents of slavery is not boundless. Congress is constrained to rationally link its definition to the concept of slavery. In Jones, the Court recognized the historical link to slavery in a long chain of racial

This Court must be guided in the instant case by the Jones majority's interpretation of Congressional power which is consistent with both a serious commitment to equality and with this Court's repeated acknowledgment that America remains "a Nation confronting a legacy of slavery and racial discrimination," seeking to overcome "a lengthy and tragic history" of societal, racial discrimination arising out of slavery.⁴⁵

discrimination in the sale and rental of property: "Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the right to acquire property], were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes." 392 U.S. at 441-42.

⁴⁵ Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 294, 303 (1978) (Opinion of Powell, J.). See also Williams v. City of New Orleans, 729 F.2d 1554, 1570-80 (5th Cir. 1984) (Widom, J., concurring in part, dissenting in part)

II. BRYSON V. MCCREARY WAS PROPERLY DECIDED AND A DECISION BY THIS COURT TO OVERRULE BRYSON WOULD RETARD THE DEVELOPMENT OF THIS NATION'S STRUGGLING COMMITMENT TOWARDS A JUST AND EQUAL SOCIETY.

A. BRYSON IS CONSISTENT WITH THE CONSTITUTIONAL MANDATE OF THE THIRTEENTH AMENDMENT AS CONSTRUED IN JONES.

Just a little over a decade ago, this Court, in a decisive 7-2 opinion, held that 42 U.S.C. § 1981 prohibits private discrimination in the making and enforcement of contracts. The legislative history of that Act, as powerfully and more

(chronicling the "effects of generations of past discrimination against blacks as a group" and the relationship of those effects to thirteenth amendment).

In addition, this Court's affirmative action decisions attest to the lingering effects in contemporary society of concepts of racial inferiority born and bred of slavery. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 463 (1980) (noting "ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity"); United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979) (recognizing the "centuries of racial injustice").

fully presented by petitioners herein,⁴⁶ demonstrates the soundness of the Bunyon decision.

In addition, the interpretation of § 1981 in Bunyon "follows inexorably from the language of that statute, as construed in Jones, Tillman (v. Wheaton-Haven Recreation Ass'n), 410 U.S. 431 (1973)], and Johnson (v. Railway Express Agency, Inc.), 421 U.S. 454 (1975)]."⁴⁷ That Bunyon was

⁴⁶ See generally Brief of Petitioner on Reargument.

⁴⁷ In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), this Court extended the reasoning of Jones to sustain a claim of racial discrimination under § 1982 for the refusal of a nonstock corporation organized to provide various amenities to the Hunting Park community to recognize a lease assignment to a Black person.

Subsequently, in Tillman, the Court essentially reaffirmed Sullivan and rejected the argument that Wheaton-Haven was a "private club" and thus immune from suit under §§ 1981, 1982, and 2000a. In a note, the Court suggested that § 18 of the 1870 Enforcement Act preserved the thirteenth amendment foundation of § 1981

properly decided is evidenced by the strength of Jones, the clarity of the intent of Congress in proposing and adopting the thirteenth amendment, and the legislative history of the Civil Rights Act of 1866.⁴⁸

The dissent in Bunyon, such like that in Jones, merely offers a competing interpretation of the congressional debates surrounding passage of Reconstruction legislation. To the extent that such interpretations are credible, they must be read in the context of the political,

after the statute was reenacted following the adoption of the fourteenth amendment. Id. at .

In Johnson v. Railway Express Agency, the Court joined in the settled conviction among the Federal Courts of Appeal "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 460.

⁴⁸ See generally Brief of Petitioner on Reargument.

social and economic disarray that generally characterized the period. Notwithstanding any resultant procedural infirmities or ambiguities in the passage of various legislation, the substantive intent of Congress was clear --- to become a more perfect union, the institution of slavery had to be eliminated, root and branch. Particularly under such circumstances, neither the constitutionality nor the purpose of legislative action taken by Congress should "depend [entirely] on recitals of the power under which it undertakes to exercise."⁴⁹ A belated shift in emphasis on the various pronouncements in Congress will unnecessarily strip away "an important part

⁴⁹ Woods v. Miller Co., 333 U.S. 130, 144 (1948).

of the fabric of our law."⁵⁰ This Court must not pervert the clear substantive intent of the Reconstruction Congress by minimizing the magnitude and comprehensiveness of the evil it sought to exercise from this nation, and which persists in society today.

B. RECONSIDERATION OF BUNYON SIGNALS A RETREAT FROM THE FUNDAMENTAL PROTECTIONS AGAINST INVIDIOUS RACIAL DISCRIMINATION AND A REMOVAL OF THE MARTINE AMENDMENTS.

1. Section 1981 is essential in providing necessary remedies for eliminating the remaining badges and indicia of slavery banned by the Thirteenth Amendment.

Overruling Bunyon and thereby burying § 1981 would be simply disastrous, particularly for Black Americans who were specifically intended to benefit from the statute. Despite the gains achieved during the modern civil rights era, Black

⁵⁰ Bunyon, 427 U.S. at 190 (Stevens, J., concurring).

Americans have never fully recovered from the ordeal of slavery. The nexus between slavery and contemporary racial discrimination extends beyond tangible injuries and cannot be denied:

Slavery brutalized human dignity. In modern America, acts motivated by arbitrary prejudice continue to inflict the wounds that were institutionalized under slavery. When arbitrary prejudice blocks a person's opportunity to discharge a function, human dignity suffers deeply and in a measure that escapes precise calculation. This human hurt was one of the tragic products of slavery; this same hurt remains a tragic product of arbitrary prejudice in today's society.⁵¹

Since the revitalization of the concept of badges and indicia of slavery less than twenty years ago in *Jones*, courts have continued to recognize that a deprivation based solely on the color of a person's

⁵¹ Buchanan, *supra* note 9, at 1073. Accord F. Douglass, *Life and Times of Frederick Douglass* 150 (1962).

skin causes a severe injury compensable by an award of damages.⁵²

In the context of employment, § 1981 offers a critically important remedy to victims of racial discrimination.⁵³ The right of the newly emancipated slaves to obtain gainful employment and to be secure in the workplace were central ingredients of the freedom guaranteed by the thirteenth

⁵² See generally Comment, *Developments in the Law -- Section 1981*, 15 Harv. C.R.-C.L. L. Rev. 29, 223 - 24 & n.29 (1980); E. E. Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 Harv. C.R.-C.L. L. Rev. 56, 99 (1972).

⁵³ In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), this Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends are separate, distinct, and independent." *Id.* at 461. See also Brief *Amicus Curiae* of the American Civil Liberties Union Foundation and the North Carolina Civil Liberties Legal Foundation in Support of Petitioner at 14-20, *Patterson v. McClean Credit Union*, No. 87-107 (U.S. October Term, 1987).

amendment and protected by the Civil Rights Act of 1866.⁵⁴

[F]reedom meant more than simply receiving wages. Freedmen wished to take control of the conditions under which they labored, free themselves from subordination to white authority, and carve out the greatest measure of economic

⁵⁴ The Reconstruction Congress heard testimony that indicated that "the Black Codes told only part of the story, and a very small part at that. At the same time that the South was removing the Negro's legal disabilities from its statute books, it was covertly attempting to reintroduce a new, privately enforced slave system." Kohl, The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred Mayer Co., 55 Va. L. Rev. 272, 279-80 (1969). See also Goodman v. Lukens Steel Co., 482 U.S. ___, 107 S. Ct. 2617, 2627-28 ("the legislature's central concerns in 1866 revolved around actions taken by the States and by private parties which consigned black Americans to lives of perpetual economic subservience to their former masters") (second emphasis supplied); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1008 (S.D. Tex. 1981) ("Section 1981 protects a panoply of individual rights the primary one being the right to contract to earn a living.").

autonomy.⁵⁵

The historical interference with the right of Black Americans to work for wages is a long and well documented one. The continuing impact of such interference cannot be understated. A recent report by the Commission on Minority Participation in Education and American Life, "One-Third of a Nation," concluded that "America is moving backward -- not forward -- in its efforts to achieve the full participation of minority citizens in the life and prosperity of the nation." Noting steady and widening gaps between the minority and majority populations in "education, employment, income, health, and other basic measures of individual and social well-being," the report predicts grave consequences with respect to the social

⁵⁵ E. Foner, *supra* note 2, at 102-03.

harmony and security of this nation.⁵⁶ Thus, now, as during the post-Reconstruction period as recognized by noted historian Eric Foner:

the fulfillment of blacks' "noneconomic" aspirations, from family autonomy to the creation of schools and churches, all depend[] in considerable measure on success in winning control of their working lives and gaining access to . . . economic resources⁵⁷

Remedies for interferences with the right to contract for employment must be as varied and comprehensive as the injuries. Section 1981 entitles a successful claimant to both equitable and legal relief, including compensatory and, under certain

⁵⁶ Cf. Kerner Commission Report; 2 Decades of Decline Chronicled by Kerner Follow-Up Report, N.Y. Times, March 1, 1988, National News page (noting a 'persistent, large and growing American economic underclass').

⁵⁷ E. Foner, *supra* note 2, at 110.

circumstances, punitive damages.⁵⁸ Both as a compensatory and deterrent measure in the struggle for racial equality, § 1981 is an indispensable remedy and is necessary if the "badges and indicia of slavery" are ever to be eradicated from this society.

2. Overruling Runyon would destroy the recent expansion of the protections of § 1981 to other oppressed groups in American society.

Just last term, in Saint Francis College v. Al-Khazraji⁵⁹, this Court unanimously broadened the scope of § 1981 by extending its protections against racial discrimination to persons of Arabian ancestry.⁶⁰ There, after announcing the

⁵⁸ See Johnson, 421 U.S. at 453.

⁵⁹ 481 U.S. ___, 107 S. Ct. 2022 (1987).

⁶⁰ In a related case, the Court similarly held that 42 U.S.C. § 1982 encompasses a claim of racial discrimination by Jews. Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 107 S. Ct. 2019 (1987).

applicability of the fundamental propositions set forth in Bunyon, the Court noted that "[t]here is no disagreement among the parties on these propositions," 107 S. Ct. at 2026, and proceeded to address the issue presented. It is indeed ironic that after such explicit acknowledgment of the vitality of the Bunyon holding in Al-Khatra, and with similar acquiescence, if not consent, to the Bunyon holding by the parties in Patterson, that some members of the Court find its application troublesome. The clear effect of a decision now to undercut the very basis of not only the Court's decisions last term, but the many judicial decisions which squarely rely upon Bunyon, would be to wind the clock backward, permitting widespread discrimination to fester.

Only thirty-four years ago, this Court rendered its most significant decision in the area of race relations. Brown v. Board of Educ.,⁶¹ marked the beginning of a national commitment to genuinely address the issue of racism, its origins and effects. By rejecting the notion, first endorsed by this Court in Plessy v. Ferguson⁶², that the doctrine of 'separate but equal' was a desirable and constitutional model of conduct, Brown began a revolution in American racial thinking. Post-Brown years witnessed the intense, and oft-times turbulent, struggle of American citizens -- Black and white -- to overcome historically entrenched -- stereotypical, racial attitudes that

⁶¹ 347 U.S. 483 (1954).

⁶² 163 U.S. 537 (1896). See also supra note 31 (discussing the implications of Plessy).

continue to plague us today.⁶³ During those years, the concerted efforts of the national government -- legislative, executive, and judicial -- aided significantly to the transitional efforts of the era.

As evidenced by the Court's decisions in Shaare Teflia and Al-Khazraji, rather than evolving into a more tolerant society, we have become a nation rife with prejudices. The proliferation of new hate groups -- e.g., the Skinheads, the Dot-Bashers -- and the cancerous persistence of the old -- e.g., the Ku Klux Klan, further signifies a nation in perpetual turmoil.⁶⁴

⁶³ For a detailed account of the post-Brown struggles, see, J. Williams, Eyes On The Prize: America's Civil Rights Years, 1954-1965 (1987).

⁶⁴ Non-violent acts of racism, such as those inflicted upon petitioner, Brenda Patterson, are no less indicative of a nation in which racism is unwilling to die.

Section 1981 is a key legislative mandate designed to deter and inevitably eliminate racial discord.

Runyon v. McCrary represents sage social policy and sound legal judgment. Its underlying propositions must not be disturbed. "[P]rotection against racial abuse by the state is significantly diminished if the same results can be accomplished by private parties."⁶⁵ Thus, if the intent of the Reconstruction Congress in adopting the Wartime Amendments and in enacting legislation thereto is not to be reduced to a 'mere paper

Indeed, they are probably more common of the discriminations that reinforce the need for a strong, national commitment towards their elimination.

⁶⁵ Kennedy, Race and the Fourteenth Amendment: The Power of Interpretational Choice, in A Less Than Perfect Union 285 (J. Label ed. 1988).

guarantee,⁶⁶ remedies against private discriminatory conduct must be preserved.

CONCLUSION

Just as the Constitution by its silence swept the ugly existence of African slavery under the rug, a decision to overrule Runyon may be similarly perceived as an inability to confront reality coupled with an unwillingness to care. For those private individuals drunk with racial hatred, such a decision will constitute a green light to execute comfortably their prejudices. For those historical and contemporary targets of private discrimination, -- Blacks, Latinos, Jews, Asians, Arabs, Native Americans, women, homosexuals -- such a decision may well create a blow so great that their faith and

⁶⁶ Jones, 392 U.S. at 443 (citations omitted).

respect in the integrity of the judiciary will be forever lost.

Accordingly, and for the reasons set forth above, and those expressed in petitioner Patterson's brief, this Court should not overrule Runyon; rather, it should reaffirm § 1981's reach to private discrimination as set forth in Runyon and affirmatively determine that it encompasses a claim of racially motivated harassment in the workplace as destructive of the right to make and enforce contracts free from prohibited discrimination.

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Counsel would like to express their appreciation for the assistance provided by Paul Heinzel and M. Susan Nadler in the preparation of this brief.

APPENDIX

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The ASSOCIATION OF LATINO ATTORNEYS (ALA) is an association of activist lawyers, law students, and other legal workers committed to the political, social and economic empowerment of the Latino community in the United States. ALA recognizes that Latinos have and continue to suffer discrimination in this society. Therefore, ALA's work focuses on the protection of human and civil rights of all Latinos under the law. ALA believes that a reconsideration of the applicability of 42 U.S.C. Section 1981 to private entities threatens established precedent which has advanced the cause for civil rights. ALA, as amici to this brief, seeks to urge the Supreme Court to maintain the precedent set regarding Section 1981 as integral to the protection of victims of discrimination.

• • •

The ASSOCIATION FOR NEIGHBORHOOD AND HOUSING DEVELOPMENT (ANHD) is a federation of over forty non-profit housing groups whose mission is to advocate and seek to implement policies and programs that create and preserve permanent affordable economical and racially integrated housing for low and moderate income New Yorkers. Overruling Runyon v. McGrary would deprive ANHD's member groups of their ability to achieve their organizational mission.

* * *

BLACKS IN GOVERNMENT - REGION II (BIG) is a non-profit organization concerned with professional and cultural development of Blacks in government employment. The membership includes both currently employed and retired persons from Federal, State and Local governments. BIG-Region II is the coordinating body for local chapters of BIG

in New York, New Jersey, Puerto Rico and U.S. Virgin Islands. The Region II Council of BIG coordinates the activities of local chapters and serves as a liaison between local chapters and the National Office.

Blacks in Government has been in the vanguard of lobbying efforts for civil rights statutes, and takes the position that the reversal of Runyon v. McGrary, 427 U.S. 160 (1976) would be a major setback for the civil rights gains made since the reconstruction era.

Therefore, we urge the Court to reaffirm the holding of Runyon v. McGrary, 427 U.S. 160 (1976).

* * *

The BOSTON COMMITTEE FOR A JUST SUPREME COURT is a coalition of diverse organizations that share a common concern that the present Supreme Court is eroding

our fundamental freedoms, especially through undermining our Constitutional protections against racial and sexual discrimination and reproductive freedom. We believe that overruling Runyon v. McCrary will set a dangerous precedent where the Supreme Court will reach out gratuitously and overturn hard fought civil rights gains.

* * *

The CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM (Albany, New York) was formed in 1981 to organize opposition to a planned visit to Albany, New York of a rugby team from the Republic of South Africa. The COALITION consists of representatives of more than a dozen organizations, including local affiliates of the NAACP, the National Lawyers Guild, Black Social Workers, YWCA and several

local organizations. The COALITION is an activist grass roots organization dedicated to ending United States complicity with the apartheid government of South Africa, supporting the liberation movement in South Africa and Namibia, and eradicating racism in the United States. Towards these ends, the COALITION has presented educational forums, has lobbied in the New York State Legislature and the United States Congress and has organized demonstrations and petition campaigns. Since May, 1986 the COALITION has also participated as a member organization of the City of Albany's Community/Police Relations Board.

The COALITION believes that progress towards eradicating racism depends, in part, on the existence of a clear mandate from the United States Supreme Court that civil rights of minorities are protected

and that victims of racism have effective real avenues of redress. The COALITION is concerned that if the Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), is overturned, it will create substantial obstacles for victims of discrimination and will provide an impetus to those who would like to see a return to the blatant and pervasive racism of the period before this Court's unanimous and historic decision in Brown v. Board of Education, 347 U.S. 483 (1954), which signaled the end of the legal system's complicity in racial discrimination. We urge this Court to reaffirm the holding of Runyon v. McCrary, 427 U.S. 160 (1976).

• • •

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the

United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

• • •

The CENTER FOR LAW AND SOCIAL JUSTICE at MEDGAR EVERS COLLEGE (CLSJ) is a research and advocacy institution, created in 1985 by a special appropriation of the New York State Legislature, to meet an existing need within the City of New York for a civil rights, social justice and legally oriented institution. The CLSJ litigation and projects deal with matters

of pressing civil and human rights nature such as employment, education, voting rights, and housing. Discrimination in these areas has historically impacted adversely on the communities we serve which primarily consist of people of African descent. CLSJ joins with amici in urging this Court to reaffirm the reach of Section 1981 to private discrimination and affirmatively determine that it encompasses a claim of racially motivated harassment in the workplace. The continued effectiveness of our efforts to help reach the goal of a society free of race discrimination requires such a ruling by this Court.

• • •

CLERGY AND LAITY CONCERNED (CALC) is a nationwide multi-racial network of people of faith and conscience from all walks of life. CALC represents fifty chapters with

35,000 members in the United States and West Germany. CALC exists to help build a movement of justice and peace which will include people of different races, religions, ages, ethnic and economic backgrounds. Through education, political involvement, and the power of truth and love in action, CALC works for fundamental social change. CALC brings moral, ethical and religious values to bear on issues of human rights, racial and gender justice, militarism and economic justice at home and abroad. CALC challenges its members as well as religious communities and others to be actively engaged in doing justice and making peace as taught by all the world's religious traditions. Founded in 1965, CALC is an organization committed to building "the beloved community" called for by one of CALC's first co-chairs, the

Reverend Dr. Martin Luther King, Jr. This community is inspired by a liberating spirituality grounded in the sacredness, harmony and balance of all creation.

* * *

The CLEVELAND-MARSHALL CHAPTER OF THE NATIONAL BAR ASSOCIATION, LAW STUDENT DIVISION (NBA,LSD) is an organization that advances the Science of Jurisprudence, upholds the honor of the legal profession, promotes social intercourse among the members of the bar and Protect the Civil and Political Rights of All Citizens.

The minority law students at Cleveland State University chose to take advantage of the networking and mentorship possibilities and founded the Cleveland-Marshall Chapter of the NBA,LSD.

The NBA,LSD focuses upon the concerns of non-white law students in an effort to

promote social intercourse among members of the bar and Protect the Civil and Political Rights of All Citizens. The organization is dedicated to effectuating change by eradicating racism and discriminatory policies and attitudes and sensitizing law schools and the legal profession to the needs of the Black Community.

Our parent organization, The National Bar Association, was founded in 1925 and now represents a network of over 10,000 lawyers, judges, law faculty, administrators and students. In 1987, the NBA expressed its commitment to reactivate its law student division through the passing of resolutions for that purpose.

* * *

The COALITION OF BLACK TRADE UNIONISTS - PITTSBURGH CHAPTER (CBTU) is a local component of a national trade union

organization which was established in 1972.

As an organization of Black trade unionists, we have been concerned and involved in societal issues which affect and concern Black people in particular and the American Labor Movement in general. Of utmost concern, we have been and continue to be involved in activities designed to eliminate racial discrimination and harassment in the workplace and in the community at large.

For example, we have fought against racial exclusion and discrimination of minorities and women from certain industries in our community and country, e.g. construction. We have coalesced with other concerned organizations to protest against racially-motivated violence against minorities. We have provided support to our members who have sought to use existing

laws to provide adequate remedies for acts of racial discrimination and harassment committed by private parties and others.

Our belief, interest and concern as demonstrated by our history is that all heretofore enacted federal civil rights laws be vigorously enforced and broadly applied to prohibit public as well as private acts of racial discrimination and harassment. For the foregoing reasons, we join herein.

* * *

The COALITION FOR COMMUNITY EMPOWERMENT ("CCE") consists of public elected officials and private citizens and is chaired by Congressman Major Owens. CCE was formed to mobilize and maximize participation of black and hispanic communities in the electoral process. CCE believes that the denial to blacks and

hispanics of the right to vote is inexplicably linked with the perpetuation of private discriminatory conduct throughout our society. Therefore, CCE joins with amici in support of its position that private discrimination is prohibited by the thirteenth amendment and Section 1981. We urge this Court to reaffirm this principle, and in doing so, the principle that race discrimination has no place in this society.

• • •

The COMMUNITY ACTION FOR LEGAL SERVICES/LEGAL SUPPORT UNIT (CALS/LSU) is a legal services office that provides support to casehandlers in neighborhood legal services offices throughout New York City. The CALS/LSU has coordinators in substantive areas of legal practice that affect poor people's lives and provides

training, advice, coordination and co-counselling assistance to attorneys and paralegals in local legal services offices. Along with local offices, the CALS-LSU is involved in a variety of appeals and class actions involving issues of substantial impact on the lives of the low-income client community. The low-income client population in New York City is composed overwhelmingly of members of racial minority groups. The CALS/LSU is interested in the outcome of the Patterson case because among the legal rights that the CALS-LSU defends on behalf of its client community is the right to be free from public and private racial discrimination, and because access to federal courts to pursue discrimination claims is critical for our clients.

• • •

The COMMITTEE OF INTERNS AND RESIDENTS (CIR) is a labor organization within the meaning of the laws of the United States and the states of New York and New Jersey. CIR was formed and is perpetuated for the purpose of representing house staff officers, (which includes interns, residents and fellows) in hospitals and health care facilities, with respect to compensation, benefits, hours of work, working conditions, education and the quality of health care services, delivery and programs.

CIR has signed collective bargaining agreements governing the interests of about 5000 house staff officers employed by voluntary and public hospitals in New York, New Jersey and Washington, D.C. All of these contracts contain clauses prohibiting discrimination by the employers. Typical

is the provision in the current contract between CIR and Catholic Medical Center of Brooklyn: "The CMC shall not discriminate against any House Staff Officer on account of race, color, creed, national origin, handicap, place of medical education, sex or age."

With ample justification both parties to the agreements perceived -- irrespective of whether the hospital was public or private -- that the asserted national policy, rooted in the Constitution of the United States, was to remove invidious discrimination from the life of this country. This perception had a major impact on the securing of these non-discrimination clauses.

CIR has a specific interest in the prevention of invidious discrimination against those it represents and against

other house staff officers without any contract protection whatsoever, as well as a general interest as the representatives of human beings, in the existence of a strong national policy against discrimination. A return to the view that Section 1981 only bars invidiously discriminatory state action would be not only destabilizing, but also damaging to the protection of minorities and an unwarranted divergence from the road toward equality along which the members of CIR and countless other citizens thought we, as a nation, were proceeding.

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CONGRESSMAN MAJOR OWENS represents the Twelfth Congressional District in Brooklyn, New York, which encompasses portions of Crown Heights, Brownsville, and the Bedford-Stuyvesant section of Brooklyn.

The majority of his constituents are black and hispanic and benefit directly from the protections afforded by the thirteenth amendment and 42 USC 1981. Congressman Owens joins amici in urging this Court to continue to extend coverage of Section 1981 to proscribe acts of private discrimination.

• • •

FRANKLIN PIERCE LAW CENTER CIVIL PRACTICE CLINIC is a clinical program at Franklin Pierce Law Center representing low income clients, primarily women and their children, in the community. We abhor racial and gender discrimination. Poor people -- our clients -- face enough hurdles and obstacles without the added burden of discrimination.

• • •

The FUND FOR OPEN INFORMATION AND

ACCOUNTABILITY, INC. (FOIA, Inc.) is an educational and activist organization dedicated to fighting for an open and accountable government. Founded in 1977 to correct the public record and expose the injustices suffered by Julius and Ethel Rosenberg who were executed in 1953 during a wave of anti-communist hysteria, FOIA, Inc. has since devoted its activities to exposing and interpreting a range of governmental initiatives.

Most recently, in conjunction with the Center for Constitutional Rights, FOIA, Inc. obtained enough documentation (through the Freedom of Information Act) from the Federal Bureau of Investigation to convincingly inform the public that the days of witchhunts are not over. These documents revealed the FBI's systematic and thorough program of intimidation,

harassment and surveillance of individuals who dissent from U.S. government policy in Central America. The issue is one of civil rights and constitutional protection. It appears that political activists, when attempting to reverse the government's Central American foreign policy, run the risk of losing their rights to constitutional protection.

FOIA, Inc. is firmly committed to affirmative action and to the 1976 Supreme Court decision in Runyon v. McCrary. While some defenders of the Constitution prefer to interpret it as the protector of elite, white, male slaveholders' interests that it once was, we understand that the improvements made to it, particularly in the Thirteenth and Fourteenth Amendments, were necessary if our society were ever to live up to the ideals expressed when this

Union was formed.

If the decision of Runyon v. McCrary is successfully challenged, just as if the intimidation of political activists continues, we surely run the risk of restoring the Constitution to its original document, devoid of the Bill of Rights.

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GAY AND LESBIAN ADVOCATES AND DEFENDERS (GLAD), incorporated in Massachusetts as Park Square Advocates, Inc., a non-profit, tax-exempt corporation, was founded in 1978 to litigate and educate on behalf of lesbian and gay civil rights. GLAD's commitment to broad based civil rights protections and to the federal government's important role in eradicating bigotry and combatting discrimination cause us to be deeply concerned about the impact this case will have on civil rights in the

United States.

• • •

The GUARDIANS POLICE ASSOCIATION is an organization of black police and law enforcement officers in Michigan dedicated to combatting racial discrimination. In 1980, the Guardians, along with the Detroit Branch of the NAACP and several individuals sued the union which represents the Detroit police officers alleging racial discrimination by the union in the negotiations which resulted in the lay offs of approximately 800 black officers. The District Court initially ruled that the union's conduct violated the duty of fair representation. Although the Sixth Circuit reversed on the duty of fair representation issue, the case was remanded for findings under 42 USC 1981. We, therefore, have a very direct interest in the outcome of the

claim since according to the Sixth Circuit the only avenue we have for redressing this discrimination is under 42 USC 1981.

* * *

The INSTITUTE OF JEWISH LAW OF Touro College, Jacob D. Fuchsberg Law Center concentrates on research and scholarship in the field of Jewish legal studies. The Institute is concerned that the gains recently won by victims of anti-semitism and other forms of ethnic, racial and ancestral discrimination will be largely lost should this court overrule Runyon v. McCrary and restrict the Civil Rights Act of 1866 to state imposed discrimination.

* * *

The JEWISH COUNCIL ON URBAN AFFAIRS (JCUA) is a non-profit organization dedicated to addressing the problems of racism, anti-semitism and poverty in

Chicago, Illinois. Founded in 1964, JCUA provides staff, volunteers and other resources to organizations based in minority communities to help those groups identify and confront issues, and achieve self-empowerment. The JCUA believes that the federal courts must continue to guarantee the full and equal rights of all citizens. Section 1981 should continue to protect minorities from discrimination by private parties. JCUA is concerned that without such federal protection, the progress of minority communities will be significantly hindered.

* * *

LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO is an unincorporated professional organization made up of latino lawyers practicing in the city and county of San Francisco, California.

The LA RAZA LAWYERS' ASSOCIATION OF SAN FRANCISCO, at its general membership meeting held on June 16, 1988 passed a motion supporting the listing of the association as an amicus on the matter of Patterson v. McClean Credit Union. The membership unanimously opposed any reconsideration of civil rights precedents which have provided ethnic and racial minorities in the United States, with the legal remedies essential to building a more integrated and just society.

• • •

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. is a New York non-profit civil rights organization dedicated specifically to test case litigation affecting the rights of lesbians and gay men. Founded in 1972, Lambda is the country's oldest and largest national legal organization devoted

to these concerns. Lambda has appeared as counsel or amicus curiae in numerous cases in both state and federal courts on behalf of lesbians and gay men who have suffered discrimination and civil rights violations because of their sexual orientation. As an organization which represents a community with very few legal protections or rights, Lambda is acutely aware of the harm to all people represented by any threat to undermine or retrench on civil rights and legal protections against the evils of discrimination. As an organization which represents a diverse community, consisting of all people of ethnic and racial groups, age, gender and backgrounds, Lambda takes a particular interest in a threat to the civil rights of any faction of our community.

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METRO-CHICAGO CLERGY AND LAITY

CONCERNED (CALC) is the Chicago chapter of a nationwide, multi-racial network of people of faith and conscience from all walks of life. CALC exists to help build a movement of justice and peace which will include people of different races, religions, ages, ethnic and economic backgrounds. CALC brings moral, ethical and religious values to bear on issues of human rights, racial and gender justice, militarism, and economic justice at home and abroad.

CALC's participation as amicus curiae to a brief which seeks to preserve important civil rights remedies is consistent with CALC's social justice ministry.

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The MID-WEST COMMUNITY COUNCIL --

CHICAGO, ILLINOIS (MCC) is a forty-two year-old community service organization based on the west side of Chicago, Illinois. It is the oldest community organization of its kind in Chicago. It provides a range of social services to approximately 100,000 Westside residents, 98% of whom are black. Its advisory council is made up of representatives of resident block clubs and other community leaders. MCC's aim is to make sure that residents have a voice in all decisions that effect them. MCC has an interest in seeing that 42 USC 1981 remains a device by which its members and the residents which it serves can continue to combat private acts of racial discrimination and violence.

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The MOUND CITY BAR ASSOCIATION (MCBA) is an organization comprised primarily of

black attorneys which includes as its purposes to improve the administration of justice, to uphold the honor of the legal profession, to promote the professional advancement of black attorneys, and to provide service to the community. Since its establishment in 1922, members of the MCBA have been actively involved in landmark civil rights litigation, including those cases which promote the principles of affirmative action. We are deeply concerned about the Supreme Court's initiative to reconsider its decision of twelve years ago in Runyon v. McCrary. There remain considerable injustices in the employment arena with blacks and other minorities still struggling for equal application of employment practices. Therefore, we urge this Court to reaffirm the holding in Runyon v. McCrary which

prohibits discrimination within private educational institutions and to apply 42 USC 1981 to the private sector.

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The MOUNTAIN STATE BAR ASSOCIATION, INC., is the only minority Bar association in the State of West Virginia.

Although originally founded in the earlier part of the 20th century, its current vitality dates from 1974.

The Association's work involves itself in the daily struggle to promote and maintain equal opportunity, in all facets of life, for all of our State's citizens.

Aside from these distinctly legal undertakings, the Association is greatly involved in raising funds to provide Fellowships for minority and needy students in the State of West Virginia. Since this component was added to our work in 1974,

nearly one hundred young women and men have been assisted in their legal education, as well as their legal careers, as a result of this program.

• • •

The NATION INSTITUTE is a non-profit tax-exempt organization that has a particular interest in the areas of First Amendment, social justice, and peace and national security. To further these interests, we have taken a special role in civil rights and civil liberties. One of the projects of the Nation Institute is to carry on the work of the Committee for Public Justice, founded in the early 1970's, which maintains a "justice watch" including equal access to the judicial process.

• • •

The NATIONAL CONFERENCE OF BLACK

LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past twenty years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the Courts. We are deeply concerned about the prospect that the Court will limit the access of civil rights petitioners to redress grievances of racial discrimination by private entities.

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The NATIONAL LAWYERS GUILD - NATIONAL EXECUTIVE COMMITTEE was founded in 1937 as

a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as amicus curiae throughout the course of the Bakke litigation and in 1977, joined with the NCBL to co-sponsor a Bakke amici roundtable attended by forty organizations. The rehearing of Runyon v. McCrary strikes at the foundation of these on-going efforts to end racism of public and private institutions.

. . .

The NATIONAL LAWYERS GUILD -
SOUTHERN ARIZONA CHAPTER is a local

affiliate of the National Lawyers Guild. Such local affiliates comprise the nationwide network of lawyers, law students, and legal workers who make up this organization. The SOUTHERN ARIZONA CHAPTER was founded on the same principles as the national organization. Among these principles are a commitment to social, economic, and political justice. Included here is a firm belief in racial equality.

In light of these principles, we are opposed to the possibility that the Supreme Court might overrule its decision in the case of Runyon v. McCrary. Past Supreme Court decisions reflect a recognition that the Thirteenth Amendment to the Constitution empowers Congress to eradicate all "historical badges and incidents" of slavery. Such "badges and incidents" occur both in the public and private sector. The

Court must not abandon these past advances. Despite recent gains, the position of racial minorities in our society is still tenuous at best. Without constant diligence their position will surely worsen. As such the SOUTHERN ARIZONA CHAPTER OF THE NATIONAL LAWYERS GUILD joins in the amicus brief. We further urge the Court to let stand their decision in Runyon v. McCrary, and to reaffirm that racism in any form will not be tolerated.

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The NATIONAL LAWYERS GUILD-UNIVERSITY OF MIAMI CHAPTER is an organization of progressive law students dedicated to the principles of freedom, equality and opportunity for all. As an organization we take a zero tolerance approach to discrimination wherever it occurs.

It is our strong belief that

affirmative action programs are the only effective tools in the effort to integrate the workplace. Discrimination can be and often is more overt in the private sector. If we are to continue the path of total integration in both public and private sectors, we must adopt the instrument which affords the most effective results and gives us concrete indicators of good faith, not just promises.

The reconsideration of Runyon v. McCrary could result in the institutionalization of private discrimination and the creation of a new apartheid via the public/private dichotomy.

The people of this country have given our legislators and life-tenured judiciary the mandate to create a society that lives up to the egalitarian ideals embodied in our Constitution. There can be no retreat

from this ideal.

• • •

The NATIONAL RAINBOW COALITION, INC. is a national membership organization founded to further the progressive movement in this country. Its membership includes persons of every race, color and creed. One of the essential founding principles of the organization is that all members of American society must have equal rights and opportunities if this society is to begin to live up to the democratic and moral principles underlying its creation and progress. Over the past two centuries, the work of the National Rainbow Coalition has been geared toward expanding opportunity to all the people of the country and consequently fighting to eliminate all discriminatory barriers which still exist. It is in this context that the National

Rainbow Coalition is deeply concerned that this Court not overrule its interpretation of 42 USC 1981 adopted in Runyon v. McCrary which held that Section 1981 reaches out to private conduct. The overruling of Runyon would constitute a disastrous step backwards undermining the constitutional foundations of equality of opportunity fought for by so many of our people over the past years.

• • •

PLAINTIFF EMPLOYMENT LAWYERS'

ASSOCIATION (PELA) is a non-profit tax exempt organization consisting of over six-hundred thirty lawyers in all fifty states and the District of Columbia. Its members specialize in representing individual employees concerning employment and labor matters. Many of PELA members' clients are employees or ex-employees with claims of

racial discrimination against private employers under 42 USC 1981. PELA members have found Section 1981 to be an effective means of securing full relief for the clients and of deterring future civil rights violations. Amicus is deeply concerned about the practical and symbolic effects of a decision of this Court overruling Runyon v. McGrary. On the practical level, many private employers will lessen their safeguards against and/or will be tempted to engage in racial discrimination, if they need not fear liability for compensatory and punitive damages under Section 1981. On a symbolic level, amicus is concerned that such a decision will be viewed as a major retreat from the national goals of equal opportunity and fair treatment for all employees.

• • •

The SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION (SCCLA) serves as a mutual support network for the Chinese-American legal community in Southern California and provides a forum for the unified expression of views on issues which effect and concern the Chinese-American and broader Asian-Pacific American communities. With a membership of more than two-hundred legal professionals, SCCLA has developed extensive ties to the community, providing it with not only much needed legal services and advocacy skills but also a representative voice on civil rights and other significant public policy issues.

The Supreme Court decision in Patterson v. McClean Credit Union to reconsider the holding in Runyon v. McGrary is a source of grave concern to SCCLA, as

well as other members of the Asian-Pacific American legal community and the Asian-Pacific American community at large. What was previously well-established law that 42 USC 1981 prohibits racial discrimination in the making and enforcement of private / contracts is suddenly in danger of being undermined and discredited. As Americans of Asian ancestry who have experienced the insidious effects of both public and private discrimination in this country, we join with other concerned individuals and organizations as amici to urge the Court to uphold the rule of law which was enunciated more than twelve years ago in the Runyan decision. A contrary result will send a clear message to the American people that the right to be free from racial discrimination is as feeble as the doctrine of stare decisis.

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SPATER, GITTES & TEREZIAN, HANDLEMAN & KILROY, and three solo practitioners, JOHN MARSHALL, GORDON HOBSON and JAMES MCHAMARA practice law in the state of Ohio. We have represented hundreds of victims of private race discrimination and private racially motivated violence in claims brought pursuant to 42 USC 1981, and have at present several such cases pending in state and federal courts.

We submit that it is essential to our ability to competently and adequately represent the interests of plaintiffs who have been the victims of private race discrimination and racially motivated violence, that 42 USC 1981 provide a cause of action against such private discrimination and violence. No other federal or state laws extend the rights and

protections available pursuant to 42 USC 1981.

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The STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. (SASU) was founded in 1970 and represents the 180,000 students of the State University system. SASU represents, advocates and furthers the interests and welfare of the students of the State University of New York. SASU engages in lobbying activity in the NYS Legislature, as well as the United States Congress, on issues relevant to college students, such as voting rights, financial aid and civil rights. SASU has also actively litigated issues of student rights and has developed programs benefiting the students of the State University of New York in regard to issues of human and civil rights in society at large.

We recognize the detrimental impact on the civil rights gains of recent years that would result if this Court reversed the holding in Runyon v. McCrary, 427 U.S. 160 (1976). We urge this Court to reaffirm Runyon v. McCrary in order to assure us, as young people, a future of greater civil rights rather than a return to legally enforced discrimination and repression.

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TOWARD A MORE PERFECT UNION is a national coalition of a spectrum of progressive organizations and individuals, including legal groups, academics, and labor unions, who are interested in participating in a unified forum to express concerns over the present Constitutional crisis and develop a broad educational campaign for a progressive celebration of our constitutional legacy during the

Bicentennial period, 1987 through 1991. The coalition is committed to organizing widespread citizen involvement in recognizing and acting upon the dangers facing civil liberties today in the hope that such acknowledgment and action will strengthen and enhance our Constitution and Bill of Rights. As a coalition concerned with protecting, advancing and enhancing our Constitution and Bill of Rights, we believe that a reversal of the decision in Runyon v. McCrary would be a serious retrenchment of civil rights gains. We therefore urge the Supreme Court to reaffirm the holding in Runyon.

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UNITED AUTOMOBILE WORKERS OF AMERICA (UAW) LOCAL 259 represents 4,000 mechanics, parts and assembly workers employed by automobile dealers and plants in the tri-

state area.

Our Union, since its inception fifty years ago, has fought to protect its members against race and employment discrimination. We are, therefore, deeply concerned about the Supreme Court's reconsideration of the 1976 Runyon v. McCrary decision.

Should this decision be reversed, it would have a devastating effect on our members and their families and reverse decades of civil rights advancement.

We, therefore, join as AMICI in this brief and urge the Court to uphold the Runyon decision.

• • •

The UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national labor organization whose essence of existence is the demonstrated commitment

towards equality and against discrimination in all of its forms, whether in the workplace or society at large, regardless of whether such discrimination is caused by government, public or private entities and individuals.

From its inception in 1936, the UE has made clear its sincere concern and commitment not only to improve the "working and living conditions" of its members (UE National Constitution), but to support those efforts and laws which seek to eliminate racial inequality in our nation. For example, UE unequivocally declared at its founding convention that it opposes "all forms of discrimination of foreign born or Negro workers." Since that time, UE has repeatedly expressed in convention resolutions its opposition to racial discrimination, has successfully included

protective language in all of its collective bargaining agreements, and has fought discrimination against its members on the shop floor, and pursued remedies through legal proceedings.

Moreover, UE has supported and participated in the Civil Rights Movement and supports the Civil Rights Act of 1964 and those laws, regulations and court interpretations which give it full and wide applicability in dealing with acts of racial discrimination and racial harassment by public bodies, government officials, private entities and individuals.

Thus, any official "review", "reconsideration" or similar initiative taken regarding the Civil Rights Act of 1964 or any other civil rights law is of deep concern and interest to the UE and its members.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

—against—

MCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICUS CURIAE OF ERIC FONER, JOHN
H. FRANKLIN, LOUIS R. HARLAN, STANLEY N.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-107

 BRENDA PATTERSON,
Petitioner,

—against—

MCLEAN CREDIT UNION,

Respondent.

 ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICUS CURIAE OF ERIC FONER,
JOHN H. FRANKLIN, LOUIS R. HARLAN,
STANLEY N. KATZ, LEON F. LITWACK,
C. VANN WOODWARD AND
MARY FRANCES BERRY**

CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, amicus curiae, see Appendix A.

AMICI'S STATEMENT OF INTEREST

This brief, *amicus curiae*, is submitted, pursuant to Sup. Ct. R. 36, on behalf of the above-named historians who respectfully urge the Court not to reconsider the interpretation of 42 U.S.C. § 1981 adopted in *Ranney v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976). The events leading up to, and surrounding passage and enforcement of, the Civil Rights Act of 1866 ("the Act") clearly establish that the holding in *Ranney* was correct. The Act was an express recognition by Congress of the need for the federal government, and its courts, to protect against violations of the civil rights of all Americans, black or white, regardless of whether the offender be a private individual, state official or a discriminatory state statute or local ordinance.

The issue before the Court in *Ranney* and now before this Court requires ascertaining congressional intent regarding matters that transpired more than 120 years ago. The Amici are historians who have devoted much of their professional lives to the study of race relations, the Civil War and the period of Reconstruction that followed the Civil War.¹ As historians, it is their function to discover and explain historical facts and put them in their proper context. Accordingly, the Amici are well qualified to provide the Court with a somewhat broader historical context and perspective for construction of the Act. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 64 Am. Hist. Rev. 64 (1963).

SUMMARY OF ARGUMENT

The broad sweep of protection offered by the Act can only be fully appreciated if the statute is examined within its full historical context. The context cannot be limited to statements made in Congress; rather it includes (1) the nature and scope of the problems facing the newly emancipated blacks and their white supporters which the Reconstruction Congress intended to rem-

¹ Biographical sketches of Amici are set forth in Appendix B.

edy; (2) the expansive constitutional theory of civil rights enforcement on which the Act was based; (3) the statute's own broad enforcement provisions; and (4) the manner in which the statute was implemented and understood by the federal judges and legal officers who enforced the Act in the 1860's and 1870's.²

This examination will show that *Ranney* was decided correctly. It will conclusively demonstrate that the Act was intended by its framers—and so used by those charged with its implementation—to protect the civil rights of both blacks and whites, notwithstanding whether the source of a civil rights violation was a private individual, a state official or a discriminatory state statute or local ordinance.

Congress fully understood that it was confronting pervasive prejudice among private individuals and state officials, as much as discriminatory laws enacted by the Southern states. The framers further recognized that white federal officials and Southern unionists, as much as blacks, required protection. Congress responded to these needs by conferring primary civil and criminal jurisdiction on the federal courts to enforce civil rights in cases involving private individuals and state officials.

It is historically inaccurate to superimpose the modern state action/private discrimination dichotomy upon the Reconstruction Congress' deliberations on the Act. The framers of the Act viewed the thirteenth amendment, on which the statute is based, as affording ample constitutional authority to legislate against violations of those civil rights guaranteed by United States citizenship irrespective of the offender's status.

² The Court has not previously considered the history of civil rights enforcement during Reconstruction. The most comprehensive study of this subject is R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights-1860-1876* (1982) (hereinafter cited as "*Politics of Judicial Interpretation*").

ARGUMENT

I. THE ACT WAS THE RECONSTRUCTION CONGRESS' RESPONSE TO THE POST-WAR FLIGHT OF BLACKS AND THEIR WHITE SUPPORTERS WHO FACED VIOLENCE AND HARASSMENT BY PRIVATE INDIVIDUALS AND DISCRIMINATION IN STATE COURTS

A sizable number of Southern whites rejected the Union's victory and the principals for which that victory stood. Many of these individuals retained significant local, if not state-wide or regional, economic and political power following the Civil War. Their expressions of defiance took many forms and were the precipitating factors leading to enactment of the Act and later, the fourteenth amendment.

A. A Systemic Pattern of Violence

Southern whites who rejected the Union's victory expressed their defiance, in part, through violent assaults against the freedmen, white unionists and federal officers in the South.¹ Violence was often committed with impunity as local law officers refused to offer protection and prosecute offenders. The special Congressional Joint Committee on Reconstruction, see Report on Reconstruction (hereinafter cited as "Cong. Report"), 1 Cong. Globe, 39th Cong., 1st Sess. (1866), which held hearings on post-war conditions in the South, heard extensive testimony regarding the failure of local and state officials to enforce the criminal laws where the victim was black or viewed as a white unionist.²

1 L. Litwack, *Been in the Storm So Long: The Aftermath of Slavery*, 221-91 (1991) (hereinafter cited as "Litwack, *Aftermath of Slavery*"); R. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 874-77 (1986); R. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 Am. Hist. Rev. 43, 70-71 (1987).

2 See also Reports of Asst. Comm. of the Freedmen's Bureau, 1867-68, S. Exec. Doc. No. 27, 23, 39th Cong., 1st Sess. (1866); Freedmen's

Southern whites often used violence to reintroduce discipline and perpetuate a system of *de facto* slavery. Freedmen who expressed their newly acquired liberty by attempting to leave their former masters' plantations, by attempting to acquire property or by disputing labor settlements, were often assaulted and murdered. For example, the Joint Committee heard testimony about a private organization known as the "black cavalry" which forcibly returned to their original masters freedmen who had left for other employment and insured future compliance by whipping and flogging. Cong. Rep. at pt. 1, 145. See also Litwack, *Aftermath of Slavery*, at 274-78; Foster, *Reconstruction*, at 120-21, 131-32, 135-36.

Blacks also received similar punishment for perceived insolence and insubordination when they failed to be deferential to whites and abide by the etiquette of inferiority that had governed their behavior toward whites during slavery. See Litwack, *Aftermath of Slavery*, at 370-74. The use of violence against blacks as a means of social control and economic discipline was pervasive, as was the unwillingness of local authorities to prosecute whites for crimes against blacks. See, e.g., Letter from Bvt. Maj. Gen. Clinton B. Fisk to Oliver O. Howard, Mar. 12, 1866, (Letters Rec'd by the Comm. of the Freedmen's Bureau, Ser. 15, Record Group 105, National Archives) (transmitting report of Mar. 5, 1866 of Peter Bonestell of outrages in Eastern Kentucky).³

Blacks also met with violence from private individuals when they attempted to enforce their contractual rights or to acquire

Affairs, S. Exec. Doc. No. 68, 39th Cong., 1st Sess. (1866); Murder of Black Soldiers, H.R. Rep. No. 23, 39th Cong., 2d Sess. (1866); E. Foster, *Reconstruction: America's Unfinished Revolution—1863-1877* (1988) (hereinafter cited as "Foster, *Reconstruction*"); Kaczorowski, 61 N.Y.U. L. Rev. at 874-75.

3 J. Franklin, *Reconstruction After the Civil War*, 71-72 (1967); Kaczorowski, 61 N.Y.U. L. Rev. at 874-75; Numan, *To Set The Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks—1863-1868*, 128-32 (1978) (hereinafter cited as "Numan, *Legal Rights of Blacks*").

property. These contractual "rights" were, more often than not, imposed on terms proposed by white employers who used violence and torture as a means of contract negotiations. In Virginia, for example, blacks were tied up by the thumbs if they did not agree to work for the price set by the landowners. Cong. Rep. at pt. ii, 33.

These acts of violence and terror, and the flat refusal of Southern whites, in and out of government, to acknowledge that blacks had any legal status or individual rights, formed the backdrop against which the Thirty-Ninth Congress acted.

B. Abuse of the Local Legal Process

Physical violence was not the only form of harassment in the post-war South. Southern whites who had supported the Union during the Civil War and federal officers who had sworn to uphold the rights of all citizens were subjected to private civil suits and to criminal prosecution for acts done under federal authority. For example, a Union general had civil and criminal charges filed against him in Kentucky in 1865 for "aiding slaves to escape." *I Freedom: A Documentary History of Emancipation—1861-1867*, 657-58 (Berlin ed. 1983).⁶

C. Economic and Social Restructuring

The end of the Civil War and the abolition of slavery was the deathknell to a social and economic order which had existed for two centuries. A new order had to replace the old. Victorious Northerners attempted to secure emancipation as a practical reality by establishing their economic system of free labor based

on individual rights, particularly the rights to contract and to property, which relegated economic and social relationships to private ordering. Foner, *Reconstruction*, at 143-44. Southern white landowners, however, could not conceive of their former slaves as possessing any rights, especially the right to negotiate and contract with them concerning the terms of their employment on the basis of equality. See, e.g., Howard, *Autobiography of Oliver Otis Howard*, 279 (1907); Letter from Samuel Thomas to O. Howard, Sept. 6, 1865, M-5 1865 (Letters Rec'd by the Comm. of the Freedmen's Bureau, Ser. 15, Record Group); 105 National Archives; Foner, *Reconstruction*, at 149-50. They often refused to enter labor contracts with freedmen.

The Joint Committee heard testimony that many former slaveholders objected to paying any wages at all and, at a minimum, balked at paying anything more than a fraction of the rate at which slaves had been rented before the war. Cong. Rep. at pt. ii, *passim*.

In addition to resorting to physical violence as a means of extorting contractual concessions, white landowners used a variety of economic tactics to require blacks to accept patently improper contract terms. Price fixing, lifetime contracts, exorbitant rent and land charges that were equivalent to wages were among the chosen tactics. Cong. Rep. at pt. ii, 228, pt. iii, 80. As the Congressional Report noted at pt. ii, 123: "There is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves." See also N.Y. Times, Jan. 27, Aug. 1, 1865.

Freedmen, on the other hand, understandably were reluctant to enter into labor contracts with landowners that were intended to reduce the freedmen to a condition of servitude. Into this social and economic chaos stepped agents of the Freedmen's Bureau in 1865 and early 1866 acted as middlemen and tried to force both landowners and freedmen to enter into equitable labor contracts. They also tried to enforce contracts on behalf of both the freedmen and the landowners. Nieman, *Legal Rights of Blacks*, at 172-90. However, this effort was in-

6 See also, e.g., General Order No. 3, Jan. 12, 1866, Adjutant General Office, reprinted in *The Political History of the United States of America During the Period of Reconstruction*, 122 (E. McPherson ed. 1977); Letter from T.J. Grady to Lyman Trumbull, Jan. 8, 1866 (Lyman Trumbull Papers Library of Congress); Letter from George A. Connor to Zachariah Chandler, Jan. 14, 1866 (Zachariah Chandler Papers); Letter from W.W. Trumble to John Sherman, Feb. 12, 1866 (John Sherman Papers Library of Congress); St. Louis Daily Missouri Democrat, Jan. 17, 1866; "The Reconstructed," Rochester, Democrat, Feb. 13, 1866; 12 *Harper's* 808 (1866); Kaczorowski, 91 A.H.R. at 71.

sufficient as landowners often refused to honor the labor agreements they entered and local law enforcement agencies and courts usually refused to give the freedmen relief and to redress their rights.

D. The Black Codes

Southern white supremacists also sought to reinstitute the discipline and social control over blacks that accompanied slavery with legislation referred to as the "Black Codes." These codes have, on occasion, been incorrectly cited as the focal point of the Act and, in turn, supportive of the notion that the Act was enacted solely to strike discriminatory state laws and secure equal protection under state law.

History does not support such a construction. Union military commanders and Freedmen Bureau agents nullified the Black Codes adopted in 1865 and early 1866 and ordered federal officers to disregard them. J. Sefton, *The United States Army and Reconstruction—1865-1877*, 70-72, 90 (1967). Moreover, the Northern outcry against the Black Codes was so strong that by the time the Act was enacted, many of these codes had already been modified so that they were facially impartial. Foner, *Reconstruction*, at 201.

While the Black Codes were of some concern to the framers, they were by no means the central focus of the Act because their abolition would not have afforded protection of the freedmen and white unionists from the violence committed against them with impunity as local law enforcement officials refused to prosecute the offenders. Nor would the removal of legal disabilities protect citizens from the discriminatory manner in which state officials and judges enforced state law. Rather than the removal of legal disabilities, the primary need of Southern blacks and whites loyal to the Union was protection from the violence and harassment of private individuals within a system of civil and criminal justice through which they could enforce and redress their rights. See Letter from Sen. Lyman Trumbull to

Mrs. Gary, June 26, 1866 (Lyman Trumbull Papers Library of Congress); Kaczorowski, 61 N.Y.U. L. Rev. at 883-84.⁷

As the preceding sections sharply illustrate, white landowners and other individuals were a principal source of civil rights violations in the post-war South. It was, therefore, critical for any effective legislation to reach private individuals. Moreover, it was necessary to reach into the private sector to further the new economic order of free labor and free men for which Northern Republicans stood. See Foner, *Free Soil, Free Labor, Freemen: The Ideology of the Republican Party Before the Civil War* (1970).

E. The Reconstruction Congress was Aware of, and Responded to, this Pervasive Pattern of Private Discrimination Supported by Public Officials

The Republicans, who controlled both houses of Congress, were keenly aware of the need to provide an alternative system of civil and criminal justice in the South. The extensive hearings held by the Joint Committee on Reconstruction produced voluminous evidence of the physical and economic discrimination that the freedmen faced on all levels in their dealings with Southern whites.

In addition, correspondence of military officers and Freedmen's Bureau agents in the South, which documented the pervasive and frequently violent nature of the problem, were some of the materials the framers read into the record of legislative debates. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull). Senator Lyman Trumbull, author of the Civil Rights Act of 1866, spent several nights at Freedmen's Bureau headquarters examining letters and reports of Bureau

⁷ That racially discriminatory laws were not the sole problem prompting the enactment of civil rights legislation in 1866 is further reflected by the Joint Committee hearings on Reconstruction which served as a foundation for congressional action in 1866. The testimony heard did not focus on racially discriminatory laws or even discriminatory legal process; rather, the focus was on the abuses by private white landowners.

agents concerning the problem touched upon in this brief. The Senator also conferred with the Commissioner of the Freedmen's Bureau, General Oliver O. Howard, who urged that legislation provide the freedmen with an alternative system of justice such as that provided by the Act.⁸

Members in the House were also well aware of these problems. When Congressman James F. Wilson, the House floor manager of the Civil Rights Act, introduced it in the House, he exhorted that, inasmuch as the states were failing to protect the personal rights of many Americans, "we must do our duty by supplying the protection which the states deny." Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

Republicans felt compelled to provide effective federal guarantees of civil rights. See, e.g., *id.* at 605, 1759 (Sen. Trumbull); *id.* at 1118, 1295-95 (Cong. Wilson). Because Southern whites refused to accept the outcome of the Civil War, Republicans believed that effective civil rights legislation was imperative to preserve and reinforce the principals of national sovereignty and emancipation for which the Unionists had fought and sacrificed. The Act, and later the fourteenth amendment, were the Republicans' expression in law of their military victory in the Civil War. *Id.* app. at 99 (Sen. Yates); *id.* at 1034, 1090 (Cong. Bingham); *id.* at 1262-63 (Cong. Broomall); *id.* at 1832, 1836 (Cong. Lawrence); The Philadelphia American, reprinted in *Scrapbook on the Fourteenth Amendment*, 41 (E. McPherson ed. n.d.) (Edward McPherson Papers, Library of Congress). When viewed from this historical perspective, it is indisputable that the Act was intended to reach private as well as official conduct.

⁸ See, e.g., Howard, *Autobiography* at 208-09; Letter from O. Howard to Senator Henry Wilson, Nov. 25, 1865 (O. Howard Papers Bowdoin College Library); Letter from Lyman Trumbull to O. Howard, Jan. 4, 1866; Letter from O. Howard to Lyman Trumbull, Feb. 8, 1866; Letter from O. Howard to J.K. Chapin, Jan. 6, 1866; (Lyman Trumbull Papers Library of Congress); Neman, *Legal Rights of Blacks*, at 106.

II. IT IS HISTORICALLY INACCURATE TO READ INTO THE LEGISLATIVE HISTORY OF THE ACT THE STATE ACTION/PRIVATE DISCRIMINATION DICHOTOMY OF OUR TIMES

In 1866, Congress did not address the issue of whether national civil rights enforcement should extend to private individuals or be limited to striking discriminatory state laws or practices. That is because the framers did not recognize the modern "state action doctrine" as a possible (or, facing the problems they faced, an acceptable) limitation on their power to redress civil rights violations. The framers believed that Congress had authority under the thirteenth amendment to protect the civil rights of all Americans regardless of the source of the violation.

A. Congress Viewed the Thirteenth Amendment, Pursuant to which the Act was Enacted, as Protecting All Americans from Violation of Their Civil Rights Regardless of the Source of the Violation

Congressional proponents of the Act understood that the thirteenth amendment delegated authority to Congress to secure civil rights. Given their expansive view of their constitutional power to redress wrongs in this area, two points become evident: (1) the Act was intended to reach private discrimination and (2) Congress did not recognize the modern state action/private discrimination dichotomy.

The framers' theory of the thirteenth amendment was much broader than the "badges of slavery" concept expressed by the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968). Imbued with a Hamiltonian conception of constitutional interpretation that was expressed by the Supreme Court under John Marshall in cases such as *McCulloch v. Maryland*, 17 U.S. 316 (1819), on which they relied as authority, see Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Cong. Wilson), the framers interpreted the thirteenth amendment's negative prohibition of slavery as an affirmative guarantee of liberty to all Americans. Thus, when Senator Trumbull intro-

duced his civil rights bill to the Senate, he explained that the thirteenth amendment

declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom.

Id. at 474.

Trumbull and Republicans generally in both Houses of Congress interpreted the liberty guaranteed by the thirteenth amendment to include the rights to life, liberty and property and all rights incident thereto. *Id.* at 1780-81 (1866) (Sen. Trumbull).⁹ Congress equated this status and these rights to the status and rights of United States citizenship. (See sources cited in footnote 6.) Congress believed that an exact enumeration of the specific rights which were incident of these generic rights was impossible. Nonetheless, Section one of the Act provides some illustration of the specific rights involved. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (Cong. Shellabarger). These rights included the economic rights to contract and to property, the means of enforcing them in the courts, and the right to governmental protection of persons and property.

Consequently, the framers of the Act understood United States citizenship to be primary in the sense that the fundamental rights of Americans were recognized and secured by the Constitution and, with the Act, the laws of the United States. Significantly, the framers considered state citizenship to be subordinate to, and derivative of, United States citizenship. See,

⁹ *Id.* at 583-84 (Sen. Howard); *id.* at 570 (Sen. Merrill); *id.* at 602, 761 (Senator Lamm); *id.* at 1235 (Sen. Wilson); *id.* app. at 101 (Sen. Yancy); *id.* at 1118 (Cong. Wilson); *id.* at 1124 (Cong. Cook); *id.* at 1131-32 (Cong. Thayer); *id.* at 1136-37 (Cong. Thurmont); *id.* app. at 118 (Cong. Deland). See also Letter from A. Nourse to Lyman Trumbull, Feb. 25, 1866, at 4, col. 2 (Lyman Trumbull Papers Library of Congress); Baltimore American, Mar. 23, 1866, collected in *Speeches on the Civil Rights Bill 4* (B. McPherson ed. n.d.) (Edward McPherson Papers Library of Congress). For additional authority, see Kaczorowski, 41 N.Y.U. L. Rev. at 898-99, n.158.

e.g., Cong. Globe, 39th Cong., 1st Sess. 1120 (1866) (Cong. Wilson). The Act was intended to secure these civil rights to all United States citizens and to protect them from disenfranchisement of their fundamental rights as citizens regardless of the nature or source—public or private—of violation.

B. Congress Did Not Recognize a Limitation on Its Power to Legislate Against Civil Rights Violations Committed by Private Persons

The difficulty modern scholars have had in understanding the framers' intention to reach private discrimination is due in significant part to modern notions of "state action." The framers did not think in these terms.

Congress did not question their authority to redress wrongs committed by private citizens that infringe on those rights. A: Senator Trumbull declared: "The right to punish persons who violate the laws of the United States cannot be questioned." Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (Sen. Trumbull); see also *id.* at 475. Congress recognized that prosecuting community leaders, both private and governmental, who violated civil rights was an effective way to eliminate the flagrant racial prejudice that was endemic to the South during this period. Thus, Senator Trumbull stated:

When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease. I think it will only be necessary to go into the late slaveholding States and subject to fine and imprisonment one or two in a State, and the most prominent ones I should hope at that, to break up this whole business.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).¹⁰

¹⁰ The framers decided, however, to criminalize only civil rights violations committed under color of law or custom to preserve state jurisdiction over ordinary crimes. *Id.* at 1758 (Sen. Trumbull).

III. CONGRESS INTENDED THE ACT TO DISPLACE STATE LAW TO THE EXTENT NECESSARY TO PROTECT THE CIVIL RIGHTS OF ALL CITIZENS, NOT MERELY TO PROVIDE EQUAL RIGHTS UNDER STATE LAW

A. Section One, 14 U.S. Stat. § 27 (1866), Guaranteed All Citizens Civil Rights Independent of State Law

Section one of the Act, 14 U.S. Stat. § 27 (1866), supplanted state laws in three important respects. First, it supplanted state statutes relating to citizenship to the extent that it conferred citizenship on all persons born or naturalized in the United States and not subject to any foreign power (except for Indians not taxed). States no longer could deny the status of citizen to such persons.

Second, it extended to all United States citizens the rights specifically enumerated therein. As Senator Trumbull declared:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the states of the union.

Cong. Globe, 39th Cong. 1st Sess. 1757 (1866).

The significance of this is that, pursuant to Section one, United States citizens possessed these rights independent of state law. That is, the statute gave all United States citizens a cause of action to enforce their civil rights. The thirteenth amendment authorized Congress to enact legislation "to allow [the freedmen] to come to the federal courts in all cases" if that was required to secure their civil rights. *Id.* at 1759.

Third, Section one guaranteed that all United States citizens shall enjoy the rights secured by Section one on the same basis as white citizens, the most favored citizens in this regard. To the extent that states recognized and regulated the exercise of these rights, they were required to extend to all citizens the regula-

tions they provided for the civil rights of white citizens.¹¹ However, the fact that this aspect of Section one speaks to the actions of the States themselves does not negate the fact that the first two aspects conferred rights which were being violated by private as well as public action.

B. The Enforcement Provisions of the 1866 Act Further Demonstrate that the Act Was Intended to Reach Private Individuals and State Officials

Like Section one, the enforcement provisions of the Act illustrate the intent of Congress to confer on the federal courts jurisdiction to redress civil rights violations regardless of their source.

The framers of the Act sought to provide for direct enforcement in the federal courts of those civil rights conferred pursuant to Section one irrespective of the states. Thus, Section two criminalizes violations of civil rights committed under color of law or custom. These criminal sanctions demonstrate the framers' intention directly to protect the civil rights of all citizens and not just to enforce equal treatment under state law.

Section three confers jurisdiction on the federal courts to enforce the rights enumerated in Section one. Section three is a key provision. It confers exclusive jurisdiction on federal district courts over "all crimes and offences committed against" its provisions. It confers concurrent jurisdiction on federal district and circuit courts over:

11 By providing that all citizens have the same rights "as is enjoyed by white citizens," the framers intended and succeeded in preserving concurrent state regulations of these rights. As a New York Evening Post editorial noted:

Congress does not say in this bill by what rules evidence shall be given in courts, by what tenure property shall be held, or how a citizen shall be protected in his occupation. It only says to the states, whatever laws you pass in regard to these matters, make them general; make them for the benefit of one race as well as another.

New York Evening Post, collected in *Scrapbook on the Civil Rights Bill*, Edward McPherson Papers.

all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section [of the Act].

The foregoing provision manifests the framers' intention to confer on the courts of the United States primary civil and criminal jurisdiction over civil rights violations under Section three because of the blatant disregard of local and state courts for assaults on the persons and property of blacks and their white supporters. In addition, the framers authorized the federal courts to replace state courts and to try civil and criminal cases that the state courts would otherwise have tried whenever individuals could not enforce their rights in, or were denied their rights by, state courts. This is the import of Congressman Wilson's admonition that, since the states were not protecting the personal rights of many Americans, "we must do our duty by supplying the protection which the states deny." Cong. Globe, 39th Cong. at 1118. See also Senator Lane's comments *id.* at 602-03. Accordingly, Section three established a federal administration of civil and criminal justice as an alternative to that of the states when Americans needed it. R. Kaczorowski, *Politics of Judicial Interpretation*, at 7-12.¹²

Section three does not explicitly grant federal court jurisdiction to remove legal disabilities in state law or to grant injunctive relief against state officials performing or threatening to perform unconstitutional acts. The failure of Congress to confer such jurisdiction is a further indication that Congress did not merely intend to confer under the Act a right to nondiscriminatory state laws.¹³

12 The interpretation of the Act advanced in this brief may raise questions that go beyond the issue now before the Court. Accordingly, it is unnecessary to address those questions at this time.

13 As to injunctive relief against state officials, the framers may have believed that they had an eleventh amendment problem. That the eleventh amendment does not bar injunctive relief in such cases was not fully resolved by the United States Supreme Court until forty years

If the Act were intended merely to remove legal disabilities in state law one would expect it to have said so clearly as does Section one of the fourteenth amendment and explicitly to give federal courts jurisdiction over cases brought to remove such disabilities or to enjoin state officers from enforcing discriminatory state laws or to challenge the constitutionality of discriminatory state laws. Yet, it gives none of these causes of action and a thorough search has failed to disclose a single reported case brought under the Act to enjoin a state officer from enforcing a discriminatory statute or to challenge the constitutionality of such a statute.

The enforcement provisions of Section three evidence the framers' understanding that they were enforcing rights secured by the United States Constitution and not simply an equality in state-conferred rights. This is further demonstrated by the fact that the Act includes other enforcement provisions (*e.g.*, 9 Stat. 462 (1850)) taken from the Fugitive Slave Act of 1850 which also was enacted ironically to enforce constitutionally protected "rights of Americans, the rights of slaveholders in their slaves." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).

later in *Ex parte Young*, 209 U.S. 123 (1908). See Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 Penn. L. Rev. 515 (1977). Even if the framers believed that Congress could have authorized facial challenges to discriminatory state statutes, it did not expressly grant this authority.

Since there was no general federal question jurisdiction in the federal courts until 1875, individuals may not have been able to sue in federal courts to void discriminatory state laws or to enjoin their enforcement unless Congress expressly conferred a right to do so. Therefore, individuals would have been powerless to enforce rights under the Act if it merely conferred a right to nondiscriminatory laws. (Of course, with the grant of general federal question jurisdiction in 1875, federal courts had sufficient jurisdiction to enforce Section one rights even if Section three jurisdiction was interpreted as requiring discriminatory state action.)

Responding to the plight of federal civil and military officers who were assisting the Southern freedmen in their transition from slavery to citizenship, for example, Section three affirmed military practice by conferring on civil and military officers of the United States a right to remove any civil suit or criminal prosecution commenced against them in any state court for actions taken to enforce the Act and the Freedmen's Bureau Act. General Orders No. 3, Jan. 12, 1866, Adjutant General Office cited in fn. 6, *supra*.

Like Section three, other provisions of the Act granted broad enforcement powers to the federal government. For example, Sections four and five authorized and required United States attorneys, marshalls, commissioners and any other officers appointed by the President to arrest and prosecute all persons who violated the Act. Section six provided criminal penalties against anyone who interfered with the enforcement of the Act. Section Nine authorized the President "to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act." There is no cogent explanation why Congress would have authorized the use of the military to enforce the Act in these ways if it was merely intended to remove legal disabilities. *Runyon v. McCrary*, 427 U.S. at 195 (White, J. dissenting).

The jurisdiction Congress conferred on federal courts to enforce civil rights directly evince the framers' intention to apply its authority beyond the removal of legal disabilities. Indeed, Congress could confer jurisdiction on federal courts to enforce civil rights, and not just equality under state law, only if the framers believed that they had authority to enforce the rights themselves. If the Act had only removed legal disabilities by prohibiting racially discriminatory state laws regarding state-conferred rights or by conferring a right to racially impartial state laws relating to state conferred rights, Congress could not have conferred on United States courts Section three jurisdiction to try civil actions between private parties and criminal cases, thereby enforcing the rights directly.

Under the prevailing constitutional theory of the framers' time, the remedy available was held to be coextensive with the rights conferred. See *Slaughter-House Cases*, 83 U.S. 36, 76-81 (1873); *United States v. Cruikshank*, 92 U.S. 552 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883). Moreover, a statute limited to removing the legal disabilities of blacks would not have afforded protection to the civil rights of whites, and the framers were clear in expressing their intention to give whites the same protection.¹⁴ It is simply illogical to interpret Section one as merely removing legal disabilities when Section two criminalizes certain violations of Section one rights, Section three confers on federal courts primary civil and criminal jurisdiction over cases involving these rights, and other provisions call on the armed forces of the United States to enforce the Act.

In sum, the framers of the Act understood that they were enforcing broad constitutionally secured rights of all American citizens. They left no question that they intended to apply federal authority over civil rights to private individuals. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-35;¹⁵ Cong. Globe, 39th Cong., 1st Sess. at 601 (Sen. Hendricks). Neither logic nor the

14 The framers' intention to protect whites loyal to the North is a feature of the legislation that reflects details of history peculiar to this period. Although the framers understood the need and intended to protect blacks, as blacks, from racial discrimination, they did not intend to protect whites, as whites. Rather, they understood that the need to protect whites arose from their association with the Union government either as federal officials or as political loyalists. Because these conditions no longer exist, it is hard to imagine the Act being applied to protect whites today in any way other than their being victims of racial discrimination as the Court held in *St. Francis College v. Al-Khazraji*, ____ U.S. ____, 107 S. Ct. 2022 (1987) and *Sheare Tefila Congregation v. Cobb*, ____ U.S. ____, 107 S. Ct. 2019 (1987).

15 In his dissent in *Jones*, Justice Harlan insisted that the quotations from the legislative debates used by the majority as evidence of the framers' intent to reach private discrimination "are by no means contrary to a 'state action' view of the civil rights bill." 392 U.S. at 471. Justice Harlan's view is implausible, if not untenable, in light of the pervasive problems that Congress was seeking to remedy and the enforcement provisions adopted in response.

historical context within which the Act came to life support the notion that Congress intended to limit the scope of the Act so as not to reach private discrimination. The ambiguity in the Act's reach is created by subsequent misinterpretation of the statute's legislative history based on modern concepts that have no applicability in determining congressional intent in this instance.

IV. UNITED STATES JUDGES AND LEGAL OFFICERS WHO IMPLEMENTED THE CIVIL RIGHTS ACT OF 1866 INTERPRETED IT AS PROTECTING THE RIGHTS OF BOTH BLACKS AND WHITES AGAINST PRIVATE AS WELL AS STATE ACTION

Deriving congressional intent in this case is complicated by the passage of time and the evolution of our legal culture. Accordingly, the meaning and scope attributed to the Act by the judges and legal officers who were given the responsibility of enforcing it in the 1860's and 1870's is of vital importance to our understanding today.

United States judges and many state appellate courts in the 1860's and early 1870's recognized in their decisions that the thirteenth amendment and the Act extended to redress civil rights violations by private individuals. They interpreted the thirteenth amendment as a delegation to Congress of authority to secure liberty and the fundamental rights of which it consists. *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1867) (No. 16, 151); *In re Turner*, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14, 247); *Slaughter-House Cases*, 15 F. Cas. 649, 652-53, 655 (C.C.D. La. 1870) (No. 8, 408), *rev'd*, 83 U.S. 36 (1873); *In re Hobbs*, 12 F. Cas. 262, 264 (C.C. N.D. Ga. 1871) (No. 6 550); *United States v. Given*, 25 F. Cas. 1324, 1325 (C.C.D. Del. 1873) (No. 14, 897). See also *People v. Washington*, 36 Cal. 658, 664-65 (1869), *overruled*, *People v. Brady*, 40 Cal. 198 (1870), *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43 (1873); *Smith v. Moody*, 26 Ind. 299, 307 (1866).¹⁶

¹⁶ For the most complete discussion of civil rights enforcement in the federal courts during Reconstruction, see Kaczorowski, *Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights* (1985).

Federal courts upheld the Act's constitutionality; interpreted it as securing the fundamental civil rights enumerated in Section one and not merely as removing legal disabilities; applied it in cases involving private discrimination; and distinguished between discriminatory state law and custom by enforcing the statute against discriminatory custom in the absence of discriminatory state law.¹⁷

For example, in *Stevens v. Richmond, Fredricksburg & Potomac Railroad Co.*,¹⁸ a South Carolina black woman and her husband successfully sued a railroad under the Act for barring her from riding on the first class car even though she had a first class ticket. She was returning to her home in Charleston, South Carolina from New York and had been riding in the first class car until the train crossed into Virginia. In Richmond, she was forcibly removed to a car designated for black passengers. A jury found that the railroad had violated her rights under Section one of the Act and awarded her \$1,600 in damages.

Judges also interpreted the language of Section one, "as is enjoyed by white citizens," not as a grant of equal rights under state law but rather as requiring state regulation of the exercise of rights secured by Section one to be racially impartial. *United States v. Rhodes*, 27 F. Cas. 786, 788 (C.C.D. Ky. 1867); *Peo-*

¹⁷ See, e.g., *In re Turner*, 24 F. Cas. at 337 (apprentice contract); Charge to Grand Jury, reported in newspaper, see fn. 20, Underwood Scrapbook; Charge to Grand Jury reported in unidentified newspaper enclosed in Judge R. A. Hill to B. H. Bristow, July 28, 1871, source chronological file (N.D. Miss.), Record Group 60, National Archives; report of indictment under the Civil Rights Act of the proprietors of the Davis Avenue Railroad in Mobile, Alabama for refusing to carry black passengers, newspaper clipping collected in Scrapbook on the Civil Rights Bill, at 136. See also clippings of Baltimore American, Apr. 16, 1866, *id.* at 109; Detroit Post, Sept. 14, 1866, Underwood Scrapbook *id.* at 120; Philadelphia Daily News, Apr. 23, 1866, *id.* at 109, 110-11; unidentified newspapers collected in *id.* at 108, 119, 136; Cincinnati Gazette, July 4, 1867, at 1; N.Y. Times, May 14, 1871, at 1; Correspondence Relative to Reconstruction, S. Exec. Doc. No. 14, 40th Cong., 1st Sess. 208-09 (1867).

¹⁸ This case is reported in newspaper accounts collected in Scrapbook 193, 203, 205, 227 (John C. Underwood ed. n.d.) (Judge John C. Underwood Papers Library of Congress).

ple v. Washington, 36 Cal. 658, 666-67, 669-70 (1869), *overruled*, *People v. Brady*, 40 Cal. 198 (1870), *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43 (1873).

Federal judges and legal officers also interpreted the Act as securing the rights of whites as well as blacks. *Id.* at 793; *Slaughter-House Cases*, 15 F. Cas. at 655; Adjutant General Holt to Secretary of War, June 18, 1866, Letters Rec'd by the Comm. of the Freedmen's Bureau; N.Y. Times, July 14, 1866 at 8. State appellate courts similarly interpreted the intended scope of the Civil Rights Act as reaching whites. *People v. Washington*, 36 Cal. 658, 672-98 (Crockett, J. dissenting), *overruled*, *People v. Brady*, 40 Cal. 198, *overruled*, *Van Valkenburg v. Brown*, 43 Cal. 43; *Smith v. Moody*, 26 Ind. at 307; *People v. Rash*, 1 Houst. Crim. Cases 271 (Del. Ct. Gen. Sess. 1867); *Bowlin v. Commonwealth*, 65 Ky. 5 (1867). See also Kaczorowski, *Politics of Judicial Interpretation*, at 4-7.

The United States Attorney and District Court Judge for Kentucky, in conjunction with the Freedmen's Bureau, until 1868 undertook the burden of the prosecution and administration of cases involving white defendants accused of crimes against blacks under Section three because the testimony of blacks was not admitted in the courts of the state. *Id.* at 34. Significantly, neither the United States Attorney nor any black citizen of Kentucky challenged the legality of the state's evidence rules in federal court under the Act relying instead on the jurisdictional provisions of Section three to secure the fair administration of criminal justice.

The United States Supreme Court upheld the constitutionality of the Act in 1872. *Blyew v. United States*, 80 U.S. 581 (1872). Although it eliminated federal jurisdiction to try whites accused of having committed crimes against blacks because the black victims of these crimes were not persons affected by the prosecutions, it interpreted the Act broadly in other respects. It declared that it was "well known" that the Act was intended to protect blacks from "prejudices [that] existed against the colored race, which naturally affected the administration of justice in the state courts, and operated harshly when one of that race

was a party accused." *Id.* at 593. The Court also interpreted the Act as conferring the rights enumerated in Section one, not just removing legal disabilities, and as securing the civil rights of whites as well as blacks when it declared that the Act "extends to both races the same rights, and the same means of vindicating them." *Id.*

Agents of the Freedmen's Bureau enforced civil rights under authority of the Act and similar civil rights provisions of the Freedmen's Bureau Act of July 1866, regardless of whether state laws discriminated or were facially impartial.¹⁹ They were instructed to enforce the Act when local authorities "failed, neglected, or were unable to arrest and bring ... to trial" persons who committed crimes. Violations of the Civil Rights Bill, S. Exec. Doc. No. 29, 12-13, 39th Cong., 2d Sess. (1867). Agents prosecuted state officers who enforced discriminatory statutes. Kaczorowski, *Politics of Judicial Interpretation* at 37-38. They also prosecuted private individuals when state law enforcement agencies and courts failed to bring defendants to justice for crimes committed against blacks. *Id.* at 38, 46, n. 24. These cases were referred to military tribunals or federal courts depending upon the seriousness of the crime.

Accordingly, the history of civil rights enforcement by the courts of the day and by the Freedmen's Bureau clearly establishes that the Act was viewed as extending to and prohibiting discriminatory actions of private individuals and entities as well as public officers.

19 Letter from U.S. District Judge Robert A. Hill to Gen. C. Gillenm, Feb. 26, 1867, Records of the Ass't. Comm. of the Freedmen's Bureau for Mississippi; Capt. Jas. W. Sunderland to Maj. A. W. Preston, Feb. 6, 1867, *id.*; Letter from Allan Rutherford to Gen. John Robinson, Nov. 1, 1866, Letters Rec'd by the Comm. of the Freedmen's Bureau; Letter from Lt. W.S. McCullough to Capt. D.H. Williams, May 27, 1867, Records of the Ass't. Comm. of the Freedmen's Bureau for Arkansas; Kaczorowski, *Politics of Judicial Interpretation*, at 27-48.

CONCLUSION

The conditions that existed in the post-war South, which gave rise to adoption of the Act, the language of the framers and the scope of enforcement by those immediately responsible for redressing civil rights violations under the Act all lead to but one inescapable conclusion: the framers of the Act intended, *inter alia*, to prohibit certain forms of private activity. Accordingly, the holding in *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976) is in accord with the framers' intent, and reconsideration by this Court of that holding is unwarranted and unwise.

Respectfully submitted,

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APPENDICES

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APPENDIX A

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987
No. 87-107

BRENDA PATTERSON,

Petitioner,

—against—

McCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**CONSENT TO FILING OF BRIEF *AMICUS CURIAE* BY
ERIC FONER, JOHN H. FRANKLIN, LOUIS R. HARLAN,
STANLEY N. KATZ, LEON F. LITWACK, AND
C. VANN WOODWARD**

We, Brenda Patterson and McClean Credit Union, who are all the parties to the above-entitled cause, herein consent, by our respective counsel of record, to the filing of a brief *amicus curiae* by Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, pursuant to Rule 36(2) of the Rules of this Court.

Dated: New York, New York
June 22, 1988

/s/ CHARLES STEPHEN RALSTON/PDH

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APPENDIX B

Mary Frances Berry is, Geraldine R. Segal, Professor of History, University of Pennsylvania, Post Chancellor and Professor of History and Law at the University of Colorado. She has authored books and articles in the field of American Legal History, especially the history of civil rights, the Civil War and Reconstruction. She is a member of the United States Commission on Civil Rights. She has served as Assistant Secretary of Education in the Department of Health, Education and Welfare. She is a past Vice President of the American Historical Association and is President-Designate of the Organization of American Historians.

Eric Foner is Professor of History at Columbia University. He has authored several books on United States political history, including the period of Reconstruction following the Civil War. He has been a fellow of the Guggenheim Foundation and the American Council of Learned Societies.

John H. Franklin is James B. Duke Professor of History, Duke University, and Professor of Legal History, Duke University Law School. He has published many books and articles on the history of black Americans, equality, and the period of reconstruction. Professor Franklin has served as president of several scholarly organizations, including the American Historical Association, the Organization of American Historians, the American Studies Association, and Phi Beta Kappa. He is a Fellow in the American Academy of Arts and Sciences and has been a Fellow of the Guggenheim Foundation. He has received numerous honorary degrees.

Louis R. Harlan is Distinguished Professor of History at the University of Maryland. He has written extensively on the subject of Afro-American history. His biography of Booker T. Washington received the Pulitzer Prize, Bancroft Award, and the Beveridge Award. He is the editor of the multi-volume publication of the papers of Booker T. Washington. Dr. Harlan has served on the executive boards of the Southern Historical Association and the Association for the Study of Afro-American Life and History. He has been a fellow of the American Council of Learned Societies, the Guggenheim Foundation, the Institute

for the Advanced Study in the Behavioral Sciences, and the Society of American Historians.

Stanley N. Katz is President of the American Council of Learned Societies. The academic positions he has held include Class of 1921 Bicentennial Professor of the History of American Law and Liberty, Princeton University, and Professor of Law, University of Chicago Law School. He is a member and editor of the Oliver Wendell Holmes Devise History of the United States Supreme Court, and he has served as president of the Organization of American Historians and the American Society for Legal History. His administrative positions have included associate dean of the University of Chicago Law School, chairman of the American Bar Association Commission on Undergraduate Education in Law and Humanities, and Chairman of the Council on International Exchange of Scholars. He has written and edited several books and articles on United States history.

Leon F. Litwack is Professor of History at the University of California at Berkeley. He has also been a Fulbright Professor of American History in the Soviet Union and a visiting lecturer in the People's Republic of China. He has written extensively on the subjects of slavery and Afro-American history. His latest book on the experience of the freedmen during Reconstruction was awarded the Pulitzer Prize in history and the American Book Award. He has served as President of the Organization of American Historians, and he has been a fellow of the Guggenheim Foundation, the Rockefeller Foundation, the Social Science Research Council and the Henry E. Huntington Library.

C. Vann Woodward is Sterling Professor of History, emeritus, Yale University. He has also lectured on American history at Oxford University and the University of London. He has written extensively on the history of the South. His books have been awarded the Pulitzer Prize for history, the Bancroft Prize, the National Institute of Arts and Letters Literary Award, and the American Council of Learned Societies Prize. He has served as president of the American Historical Association, the Organization of American Historians, and the Southern Historical Association. He has also been a Guggenheim Fellow.

No. 87-107

WILLIAM J. PAVONI, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

—v.—

MCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICI CURIAE OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK AND THE
NEW YORK COUNTY LAWYERS' ASSOCIATION ON
BEHALF OF PETITIONER PATTERSON**

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No. 87-107

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

v.

MCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICI CURIAE OF THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK AND THE NEW YORK
COUNTY LAWYERS' ASSOCIATION ON BEHALF OF
PETITIONER PATTERSON**

INTEREST OF AMICI CURIAE

The Association of the Bar of the City of New York ("the Association"), chartered by the State of New York in 1871, is an organization of over 18,000 attorneys, most of whom are practicing or resident principally in the New York City metropolitan area. The Constitution of the Association provides as two of its purposes "promoting reforms in the law" and "facilitating and improving the administration of justice." The Association has accordingly devoted itself

vigorously for many years to supporting remedial civil rights legislation in Congress and before this Court.

The New York County Lawyers' Association ("NYCLA"), one of the largest county bar associations in the United States, is a New York not-for-profit corporation whose membership is composed of more than 10,000 attorneys practicing in all fields of law. Since its founding, NYCLA has been an active force in the promulgation of laws ensuring civil rights, political equality and equal justice. NYCLA has engaged in numerous activities aimed at eliminating discrimination against minorities, including preparing reports, drafting and testifying in support of legislation, and appearing as *amicus curiae* in litigation in both federal and state court.

The Court's direction to the parties to brief whether *Runyon v. McCrary*, 427 U.S. 160 (1976) should be reconsidered threatens one of the principal missions of bar associations such as *amici*: the promotion of respect for law. In New York, achieving and maintaining the confidence of racial minorities in legal institutions is an ongoing and critically difficult task. Overruling *Runyon* would cause tremendous damage to the Bar's ability to accomplish that task.

Amici believe that the remedy 42 U.S.C. § 1981 provides to redress racially-based refusals to contract is essential to make the national commitment to eradicating discrimination more than a paper promise. To ensure that that promise is not broken by an unjustified retreat from advances made and repeatedly ratified by the people's representatives in Congress, we submit this brief *amicus curiae*, with the consent of both parties indicated by letters lodged with the Clerk, urging the Court to adhere to *Runyon v. McCrary*.

INTRODUCTION AND SUMMARY OF ARGUMENT

For at least three powerfully persuasive reasons — because the Court's work would otherwise be multiplied beyond reason, because the arrangements of private and governmental actors in this free society (particularly in the field of civil rights) depend in great measure on the security and stability of settled law, and because reconsideration of settled questions involving fundamental rights would imperil the public's perception of the judicial system as a dependable mechanism for redressing racial discrimination — the doctrine of *stare decisis* has commanded the unquestioning and uncontroversial allegiance of every justice of this Court. The Court may be divided in a given case about whether the doctrine requires adherence to prior decisions, but there is no dispute about the general outlines of the doctrine, and in particular no serious dispute about two propositions, both of which foreclose overruling *Runyon v. McCrary*'s holding that Section 1981 reaches private acts of discrimination.

First, while a decision construing a statute should not be overruled unless a majority is persuaded that the prior construction was clearly wrong,¹ here much historical evidence plainly supports the interpretation

¹ *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982) (refusing to overrule earlier decision, in part because previous interpretation of legislative intent was not clearly wrong); *id.* at 517 ("in a statutory case a particularly strong showing is required that we have reread the relevant statute and its history.") (White, J., concurring); *Monell v. Dep't of Social Services*, 436 U.S. 658, 664-65 (1978) (finding that earlier decision misread history "beyond doubt"); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972) (prior interpretation overruled because holding "was never good history"); *Pryton v. Row*, 391 U.S. 54, 67 (1967) (prior statutory interpretation overruled because it rested on common law notion which "finds no support in the statute and has been rejected").

of *Runyon* and its predecessors. It cannot be said of Justice Stewart's opinion for the Court in *Runyon* that it clearly and unmistakably misread the legislative language and history.

Second, a decision should not be overruled unless its reasoning has been repudiated by or is inconsistent with later decisions or has been undercut by subsequent congressional activity. This Court has uniformly adhered to its precedents when, as here, Congress has affirmatively relied on and built upon a ruling and has thereby presented the Court with a solid basis for concluding that its decision is consistent with the legislative will.

These considerations foreclose overruling *Runyon*. Far from having been undercut or repudiated by subsequent decisions, *Runyon* has served as the foundation for a series of further, uncontroversial decisions in this Court, and additional legislation by Congress predicated on *Runyon*'s interpretation of Section 1981.

Adherence to *Runyon* is also supported by the three policies principally underlying *stare decisis*: the necessity for clear guidelines and protecting reliance interests, eliminating the burdens that relitigation imposes, and the need to maintain public faith in the courts as a source of impersonal and reasoned judgment.

We will not revisit here the evidence surrounding the 19th century history of Section 1981. In light of *Runyon*'s consistency with prior decisions of this Court and of every court of appeals considering the issue, and particularly in light of consistent congressional approval of and reliance on judicial decisions construing Section 1981 as reaching private discrimination, *Runyon*'s holding that Section 1981 proscribes refusals to enter contracts on account of race must be reaffirmed.

**RUNYON v. MCCRARY IS AN INTEGRAL PART
OF FEDERAL LAW, AND HAS BEEN EXPRESSLY
APPROVED AND BUILT UPON BY CONGRESS**

The holding in *Runyon v. McCrary* that Section 1981 proscribes not only statutes depriving black persons of the right to contract with white persons but also racially discriminatory refusals by white persons to enter into contracts with black persons is not — as statutory decisions subject to reconsideration and overruling must be — “a sport in the law and inconsistent with what preceded and what followed.” *Monroe v. Pape*, 365 U.S. 167, 185 (1961). It is not “the product of hasty action or inadvertence . . . out of line with the cases that preceded.” *Id.* To the contrary, it is solidly based on prior, considered holdings, reached after full and mature consideration of the historical record; is consistent with the contemporaneous policy judgments of the political branches; and has been relied on and built upon by Congress. A survey of the interdependence and consistency of the *Runyon* holding with other aspects of modern American civil rights law is the indispensable backdrop for assessing whether principles of *stare decisis* warrant even its reconsideration, much less its overruling.

A. *Runyon* follows prior settled law

Runyon's interpretation of Section 1981 made no new law. As then-Solicitor General Robert Bork's brief for the United States in support of the parents in *Runyon* succinctly advised this Court,

it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts. This Court so held in *Tillman v. Wheaton-Haven Recreation Assn.*, *supra*, and

again more recently in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454.

Brief for the United States as Amicus Curiae in *Runyon* at 13. Solicitor General Bork's brief also noted that all eight courts of appeals that had been presented with the question prior to *Johnson v. Railway Express Agency* had concluded that "Section 1981 prohibits racial discrimination in private employment." *Id.* at 14.

Nor can *Runyon* and the holdings on which it was based be disregarded as carelessly or hastily considered. The Court's opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), on which *Runyon*'s interpretation of Section 1981 is based, contains a thorough examination of the historical record, and the parties' briefs in *Runyon* exhaustively re-marshalled most of that history. *Runyon* itself was issued against a lengthy but ultimately unpersuasive dissent which included a detailed analysis of the historical evidence. Justice Powell, concurring, expressly noted that ample precedents supported *Runyon*, and that the Court had examined the history of Section 1981 "maturely and recently." 427 U.S. at 186.

B. This Court has repeatedly adhered to *Runyon*'s interpretation of Section 1981

No doubt because *Runyon* followed settled precedent holding that Section 1981 proscribes racial discrimination in private contracts, it has been repeatedly adhered to by this Court. See *Bob Jones University v. United States*, 461 U.S. 574, 594 (1983) (*Runyon* cited to support view that a national policy disapproving racial discrimination in nonpublic education exists); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (union intentionally avoiding assertion of employee discrimination claims violates Section 1981); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) (holding

in private employment discrimination case that Congress intended to protect identifiable classes of persons subjected to intentional discrimination on the basis of ancestry); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (finding that action under Section 1981 requires proof of intent to discriminate); *Memphis v. Greene*, 451 U.S. 100, 120 (1981) (*Runyon* cited to support proposition that 1866 Civil Rights Act is applicable to private parties); and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976) (holding that Section 1981 prohibits racial discrimination in private employment against whites as well as blacks).²

² Both before and after *Runyon v. McCrary*, lower courts have applied Section 1981 to remedy racial discrimination in a variety of contexts, including many that might not be remediable under other statutes. See, e.g., *Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987) (hotel lounge policy of ejecting patrons for not drinking); *Jones v. Local 520, Int'l Union of Operating Engineers*, 603 F.2d 664 (7th Cir. 1979), cert. denied, 444 U.S. 1017 (1980) (deprivation of union's beneficiary rights policy); *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), cert. denied, 398 U.S. 929 (1970) (admission ticket to an amusement park); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974) (guest privileges in a swimming club); *Vietnamese Fisherman's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (interfering with right to earn a living); *Howard Sec. Ser., Inc. v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981) (failure to award service contract to close corporation owned by black); *Sud v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974) (automobile franchise denied by automobile wholesaler); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973) (admission to a tavern); *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971) (admission to a privately owned barber trade school); *Amerson v. Jones Law School*, Civil Action 3343-N (M.D. Ala., Aug. 10, 1972) (admission to a privately owned school); *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972) (purchase of an insurance policy); *United States v. Medical Soc'y of S. Carolina*, 298 F. Supp. 145, 152 (D.S.C. 1969) (admission of patients to a privately owned hospital).

A decision overruling *Runyon* would also necessarily overrule *Goodman*, *Saint Francis College*, and *McDonald*, and might call *Jones* and its progeny into question.

C. Congress approved of and built upon Runyon's interpretation of Section 1981 even prior to the decision in that case

When it reaffirmed Section 1981's applicability to discriminatory refusals by segregated private schools to contract with black parents for the admission of their children in *Runyon*, the Court examined not only the original legislative history of Section 1981 but also the congressional response to this Court's interpretation of Section 1981 in *Johnson* and *Tillman*. Congressional debate and action in connection with the Equal Employment Opportunity Act of 1972 clearly evidenced Congress' understanding that Section 1981 reached private discrimination, and its intention that it continue to do so.

In response to an amendment by Senator Hruska that would have rendered Title VII of the Civil Rights Act of 1964 an exclusive remedy for employment discrimination, Senator Williams stated on the floor that Section 1981 already reached private employment discrimination, and implored his colleagues not to "repeal existing civil rights laws" and thereby "severely weaken our overall effort to combat the presence of employment discrimination." See *Runyon*, 427 U.S. at 174 n.11; Brief for the United States *amicus curiae* in *Runyon* at 18 and authorities there cited. Congress rejected the Hruska amendment, clearly indicating its intention that there be a system of overlapping parallel remedies. The defeat of the Hruska amendment is therefore far more than the congressional inaction that, in far different circumstances, the Court has viewed as

unpersuasive.³ As Solicitor General Bork urged the Court:

Had Congress disapproved of this Court's interpretation of the scope of Sections 1981 and 1982, it could have amended the Civil Rights Act of 1866; all attempts to do so, however, have been defeated. *Cf., e.g., Flood v. Kuhn*, 407 U.S. 258; *Joint Industry Board v. United States*, 391 U.S. 224, 228-29 (footnote omitted).

D. Congress subsequently approved of and built upon Runyon

Congress again indicated its agreement that Section 1981 applies to private discrimination in 1976, when it enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended (hereinafter the "Fees Act"). The Fees Act expressly authorized courts to award attorneys' fees in actions to enforce Section 1981. The legislative reports, on which this Court has repeatedly relied,⁴ plainly evidence Congress' understanding that Section 1981 applies to private discrimination, its approval of that construction, and its intention to build upon it in augmenting existing remedies already provided by Section 1981:

Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).⁵ Under that section the Supreme Court recently held that whites

³ See *Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983), and cases there cited.

⁴ See, e.g., *Riverside v. Rivera*, 477 U.S. 561, 567 (1986); *Pulliam v. Allen*, 466 U.S. 522, 527 (1984); *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758 n.5 (1980); *Hutto v. Finney*, 437 U.S. 678, 694 (1978).

as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald v. Santa Fe Trail Transportation Co.*, _____ U.S. _____, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as the purchase of a home. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).⁸

⁸ With respect to the relationship between Section 1981 and the Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rept. No. 92-238, p. 19 (92nd Cong. 1st Sess. 1971). That view was adopted by the Supreme Court in *Johnson v. Railway Express Agency*, *supra*.

⁹ As with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 are complementary remedies, with similarities and differences in coverage and enforcement mechanism. See *Jones v. Mayer Co.*, *supra*.

H.R. Rep. 94-1558, 94th Cong., 2nd Sess., at 3. See also S. Rep. 94-1011, 94th Cong., 2nd Sess. 3 (1976), reprinted in 1976 U.S. Code Cong. and Adm. News 5908, 5910 (noting that Section 1981 "protects similar

rights" as Title VII "but involves fewer technical prerequisites.")

Congress reaffirmed its approval of *Runyon* yet again in 1982, when it held hearings to investigate the Reagan administration's refusal to defend IRS rules rendering donations to racially discriminatory educational institutions of education non-deductible under Section 170 of the Internal Revenue Code. See *Bob Jones University v. United States*, 461 U.S. at 574. *Runyon* was repeatedly and approvingly cited in those hearings as the keystone in the legal structure supporting the IRS determination to deny charitable deductions for contributions to racially discriminatory schools as violative of public policy.⁹ As the Court said

⁹ Witnesses at both Senate and House hearings repeatedly cited *Runyon* for the proposition that private schools may not discriminate based on race, and there was no indication any committee members believed that *Runyon* was wrongly decided. See, e.g., *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Committee on Ways and Means*, 97th Cong., 2d Sess. 187 (1982) (statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division) ("the Supreme Court said ... in *Runyon v. McCrary* that 42 U.S.C. § 1981 specifically forbade private schools from discriminating on the grounds of race or color."); *id.* at 67 (statement of Laurence Tribe, Professor of Constitutional Law, Harvard Law School) ("one of the illegal activities under the Civil Rights Act of 1866 is excluding people on grounds of race, even from a private school [according to] ... *Runyon v. McCrary*."). See also *id.* at 37 (statement of Michael I. Sanders); *id.* at 267 (Joint Statement Re the Tax Exempt Status of Private Schools submitted to the Committee on Ways and Means); *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings Before the Senate Committee on Finance*, 97th Cong., 2d Sess. 25 (1982) [hereinafter "Senate Hearings"] (background material prepared by the staff of the Joint Committee on Taxation).

(Footnote continued)

of the closely related question addressed in *Bob Jones University*, 461 U.S. at 600-01, "It is hardly conceivable that Congress — and in this setting, any Member of Congress — was not abundantly aware" that Section 1981 had been interpreted to apply to private acts of discrimination.

E. The principle that racial discrimination in the private sector is unlawful and should be actionable is not unique to Runyon, but has been widely adopted and implemented by the executive and legislative branches and by state and local governments

The primary duty not to discriminate against racial minorities in economic activity did not spring full grown from *Runyon v. McCrary*. The proscription against private discrimination reaffirmed in *Runyon*, far from being inconsistent with the weighing of values undertaken by Congress or the executive branch in other contexts, is fully consistent with a wide range of analogous proscriptions in legislation, executive orders, and administrative regulations.

As Justice Stevens observed concurring in *Runyon*, the principle that racial discrimination has no place in economic activity generally "surely accords with the prevailing sense of justice today." 427 U.S. at 191.

(Footnote continued)

Administration witnesses agreed that Section 1981 rendered it unlawful for private schools to discriminate on the basis of race. See, e.g., in addition to the statement of W. Bradford Reynolds cited above, *Senate Hearings* 240 (statement of R.T. McNamar, Secretary, Department of the Treasury) ("The Court said, in *Runyon v. McCrary* several terms ago, that Section 1981 allows private citizens to bring a private right of action against those institutions that are racially discriminating."); see also *id.* at 117, 145 n.18 ("Analysis of Legal Authorities For Possible Inclusion in a Brief," submitted by the Department of Justice).

Many of the sanctions against discrimination in the private as well as public sector were exhaustively catalogued in Chief Justice Burger's opinion for eight members of the Court in *Bob Jones University v. United States*, 461 U.S. at 592-595, where the Court found that all three branches of government had joined in forging "the fundamental policy of eliminating racial discrimination." A sampling of other such sanctions, though surely not all, is set forth below.

Congress prohibited racial discrimination in private employment in 1964, and extended that prohibition in 1972.⁶ This Court has upheld the right of private employers and unions to engage in affirmative, race-conscious action to remedy past discrimination.⁷ Congress has attempted to remedy past discrimination in certain businesses, e.g., construction, by providing for set asides for minority-owned firms, and this Court has upheld its right to do so.⁸

Discrimination in the private housing market was prohibited in 1968.⁹

Congress prohibited discrimination by recipients of federal aid — a category of institutions that includes within the private sector almost all secular institutions of higher education and hospitals — in Title VI of the Civil Rights Act of 1964, and succeeding administrations have generally enforced stringent regulations implementing that proscription.¹⁰ When this Court narrowly construed that proscription, leaving a far

⁶ Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e (1981).

⁷ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

⁸ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

⁹ *Traffante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

¹⁰ See *Grace City College v. Bell*, 465 U.S. 555, 586-592 (1984) (Brennan, J., concurring and dissenting).

broader range within which private discrimination could flourish, its decision was promptly condemned in Congress and throughout the nation at large, and was overturned by substantial majority in Congress.¹¹

Discrimination in public accommodations was made unlawful by Title II of the Civil Rights Act of 1964.¹²

States and local governments have also independently condemned and provided varying remedies for discrimination in the private economic sector, and this Court has generally upheld this legislation against claims of federal preemption on the ground that Congress considered the anti-discrimination principle so important that its purposes would be furthered by a system of partially duplicative and overlapping remedies.¹³

¹¹ The Civil Rights Restoration Act of 1987, Pub. L. 100-259, overruling *Grutter City College v. Boll*, 463 U.S. 574 (1984), was passed by the Senate 75-14, 134 Cong. Rec. 8205 (daily ed. January 28, 1988), and by the House 513-98, Cong. Rec. 11133 (daily ed. March 2, 1988). After President Reagan subsequently vetoed the measure, his veto was overridden in the Senate by 75-24, 134 Cong. Rec. 82730 (daily ed. March 22, 1988), and in the House by 292-133, 134 Cong. Rec. 111617 (daily ed. March 22, 1988).

¹² *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹³ See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 689-95 (1987) (California Pregnancy Discrimination Act not preempted by Title VII because Federal Pregnancy Discrimination Act does not conflict with the California law

(Footnote continued)

In sum, *Ranney* is wholly consistent with the legislative will of the nation. For this reason alone, it should not even be reconsidered, much less overruled.

II

PAST STATUTORY CONSTRUCTION MUST BE ADHERED TO WHERE OVERRULING WOULD CONTRAVENE RECENTLY EXPRESSED CONGRESSIONAL INTENT EMBODIED IN LEGISLATION, OR ABSENT A SHOWING THAT THE DECISION TO BE OVERRULED IS INCONSISTENT WITH SUBSEQUENT DECISIONS OR REPUDIATED BY SUBSEQUENT CONGRESSIONAL ACTION

Stare decisis is particularly weighty in matters of statutory construction. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n. 34 (1986) ("More than any other doctrine in the field of precedent, it has served to limit the freedom of the Court."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Although the Court "has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered," *Patsy v. Board of Regents*, 457 U.S. 496 (1982), more than a mistake in past interpretation must be shown, since "correction can be had by legislation," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 406 (Brandeis, J.,

(Footnote continued)

which "also promotes equal employment opportunity"). *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100-04 (1983) (Title VII held not to preempt New York statute proscribing discrimination on basis of pregnancy); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("The legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

dissenting). This Court's application of the doctrine makes clear that fully considered interpretations of statutes must be adhered to unless a decision is found to be either contrary to congressional intent or in some other sense aberrational — i.e., at odds with other clearly expressed legislative policies, or inconsistent with or repudiated by other decisions. Neither of these conditions permits overruling the interpretation of Section 1981 reaffirmed in *Runyon*.

A. Recent indications of congressional intent require adherence to *Runyon*'s interpretation of Section 1981

This Court's reluctance to overrule its own precedents is nowhere stronger than in statutory cases where reliable indications of congressional intent demonstrate approval of the Court's interpretation of an earlier statute. *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Runyon v. McCrary*, 427 U.S. at 173-75; *Monell v. Dep't of Social Services*, 436 U.S. 658, 696-99 (1978); *Laird v. Nelms*, 406 U.S. 797, 802 (1972); *Monroe v. Pape*, 365 U.S. at 192 (Harlan, J., concurring).

When presented with affirmative legislation building upon a prior decision, as opposed to only congressional inaction or rejection of an attempt to alter the statutory meaning, this Court has uniformly adhered to its statutory interpretation, even if that interpretation is arguably incorrect. Such adherence has been required by the Court's fundamental duty to interpret statutes according to operative congressional intent as expressed through duly enacted legislation. The legislative intent underlying a subsequent statute that Congress has erected on the foundation of one of this Court's prior statutory interpretations can only be respected if that prior interpretation is adhered to, even

if it could be said to have misread the intentions of the Congress that enacted the earlier statute. Indeed, cases like this one, in which Congress has affirmatively built upon this Court's alleged "mistakes" of statutory interpretation, are not *stare decisis* cases at all: the Court adheres to its prior decisions not to maintain the continuity of its jurisprudence, but rather to obey more recent congressional direction.

Thus, in *Patry v. Board of Regents*, 457 U.S. 496, 508-512 (1982), finding the legislative intentions of the nineteenth century Congress that enacted 42 U.S.C. § 1983 inconclusive, the Court relied principally on the legislative history of a far more recent statute, 42 U.S.C. § 1997e, in declining to overrule past decisions holding that exhaustion of administrative remedies was not required in Section 1983 cases. The Court observed that Congress had relied on and built upon the Court's prior, disputed interpretation of Section 1983 in designing the more recent statute. Since correction of any error "would be inconsistent with Congress' decision to adopt 1997e," overruling the decisions allegedly misinterpreting Section 1983 was deemed impermissible. Similarly, in *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Court adhered to its prior interpretation of the habeas corpus statute in *Townsend v. Sain*, 359 U.S. 64 (1959), where the voluntariness of a confession was treated as an issue of fact rather than of law, because Congress had relied on that earlier decision in designing 28 U.S.C. § 2254 (d).¹⁴

¹⁴ See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 (1982) ("Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least

(Footnote continued)

This case presents such an abundance of clear subsequent legislative intent, discernible through legislation duly enacted as well as through unmistakable rejection of an attempt to render Section 1981 inapplicable to private discrimination, that departure from *stare decisis* would be not only inadvisable, in light of this Court's unbroken line of decisions, but impermissible, a clear departure from controlling legislative direction.

First, and we believe dispositively, Congress relied on and built upon the broad interpretation of Section 1981 in *Ranyn* and its predecessors in amending 42 U.S.C. § 1988 to provide for court-awarded attorneys' fees in Section 1981 actions against private parties that refused to enter into contracts for racially discriminatory reasons. The House Report expressly cited *Ranyn's* companion case, *McDonald v. Santa Fe Trail Transp.*, as well as *Tillman v. Wheaton-Haven Recreation Ass'n* and *Johnson v. Railway Express Agency* — all involving discrimination by private actors that would not have been actionable under the narrow interpretation of Section 1981 urged in the *Ranyn*

(Footnote continued)

insofar as it affects the new statute" (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980) (representation by public interest group held not to be "special circumstances" which would result in denial of attorney fees under Title VII, because Congress so decided in passing the Fees Act of 1976); *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979) ("the relevant inquiry is not what Congress correctly perceived as the then state of the law, but rather what its perception of the state of the law was") (citation omitted); *Brown v. GSA*, 425 U.S. 820, 828 (1976) (interpreting legislation built upon prior judicial decisions in light of the understanding of Congress, not in terms of whether that congressional understanding was correct).

dissent — as illustrative of the kinds of Section 1981 actions in which private enforcement was to be induced through court-awarded attorneys' fees. Making the same point, the Senate Report explained that the Fees Act was being applied to Section 1981 cases because

fees are now authorized in an employment discrimination suit under Title VII of the Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action.

S. Rep. No. 94-1011, at 4. Since overruling *Ranyn* and its predecessors would without question contravene the Fees Act and its underlying legislative intent, the interest in fidelity to congressional intent surely cannot justify overruling *Ranyn*.

Second, as *Ranyn* noted, Congress in 1972, clearly informed that Section 1981 had been construed by various courts of appeals to proscribe racial discrimination by private employers, carefully considered and squarely rejected an attempt to repeal Section 1981 as thus understood and to make Title VII the exclusive remedy for employment discrimination. See pp. 8-9 above. Again, whether or not Congress' understanding that Section 1981 reached private discrimination in employment and education was historically correct is no longer of decisive importance. See *Patsy v. Board of Regents* and the other cases cited above at p. 16. Since the Fees Act and the Equal Employment Opportunity Act of 1972 evidence a clear legislative understanding and intention that courts should vigorously enforce Section 1981 in private discrimination cases, the Court must refrain from overruling *Ranyn* and its predecessors even if convinced that the modern interpretation of that statute as reaching private discrimination was "in

some ultimate sense incorrect," *Brown v. GSA*, 425 U.S. 820, 828 (1976).

At the very least, congressional rejection of the Hruska amendment in 1972, passage of the Fees Act in 1976, the absence of a single bill introduced to overturn *Runyon* in the 94th, 95th or 96th Congresses, and congressional approval of *Runyon* evidenced in the *Bob Jones* hearings of 1982, see pp. 8-12 above, taken all together, amount to the kind of congressional consensus that precludes departure from *stare decisis*. Such Congressional refusal to overrule a decision of this Court, where (as here) such a refusal can fairly be discerned, has repeatedly moved the Court not to undertake to correct a "mistake" that Congress is fully capable of correcting. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1450 n.7 (1987) (inferring congressional agreement with a prior decision from the fact that no bills were introduced to change result in highly publicized, controversial case, and noting that Congress remained free to change interpretation if the Court had misconstrued its intent); *Bob Jones University v. United States*, 461 U.S. at 599-602 (inferring congressional acquiescence to an IRS policy from congressional inaction); *Flood v. Kuhn*, 407 U.S. 258 (1972).¹³

¹³ See also *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 590 n.11 (1983) (White, J.) ("If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress") (citation omitted).

B. This Court's interpretation of Section 1981 in *Runyon* should be adhered to because it is not inconsistent with related precedent and has not been repudiated by subsequent legislative action

Amici believe that *Runyon* was correctly decided. But even assuming *arguendo* that it misread contemporaneous legislative intent, affirmance would be required.

The essence of *stare decisis* is that something beyond a proven mistake in past interpretation is necessary "to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 424. "Any detours from the straight path of *stare decisis* in our past," the Court has stressed, "have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986), quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 412 (Brandeis, J., dissenting). No reasons of the sort that the Court has previously relied on in departing from *stare decisis* have been offered or are available to justify overruling the rule of *Runyon* and its predecessors.

The seven cases overruling statutory precedents cited by the *per curiam* opinion restoring this case to the calendar, 56 U.S.L.W. 3735 (U.S. 4/26/1988), display the typical, indispensable factors that enable the Court to justify departing from *stare decisis* in statutory interpretation cases: in each of these cases, the Court essentially found that the decision to be overruled was an aberration, either inconsistent with another line of good authority, or subsequently repudiated by Congress in ways that enabled the Court to declare confidently

that the cases were inconsistent with legislative intent. These factors are entirely absent here.

In four of the cases, the Court overruled prior decisions that had been undercut by subsequent decisions construing the same or related statutes in different ways. Preservation of the challenged interpretation in these cases would have left conflicting and irreconcilable lines of parallel authority. Consistent application of congressional intent and fidelity to congressional purposes required resolution of the continuing conflicts. Thus, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 245 (1970), the Court overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), stressing that adherence to *Sinclair*, in light of the Court's recent decision in another case, would effectively "oust state courts of jurisdiction in 301(a) suits where injunctive relief is sought for breach of a no-strike obligation," a result which would violate "the clearly expressed congressional policy to the contrary" as recently authoritatively construed. Similarly, in *Peyton v. Rowe*, 391 U.S. 54, 57, 61 (1968), and in *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employee Relations Comm'n*, 427 U.S. 132, 154 (1976), the Court departed from prior interpretations of federal statutes because they had been so undercut by numerous subsequent decisions that, in the words of the *Machinists* decision, the prior authority "must be regarded as having 'been worn away by the erosion of time' . . . and of contrary authority." 427 U.S. at 154, citing *United States v. Raines*, 362 U.S. 17, 26 (1960). And in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972), the Court relied on the fact that subsequent cases had read the relevant legislative history differently than did the case being overruled. It noted that "later cases . . . have repudiated the reasoning advanced in support of the result reached" in the case being overruled and concluded that the case "was never good history and is no longer good law." 406 U.S. at 322.

In two other cases cited in the *per curiam* order, the Court found that the prior statutory interpretations under review had been undercut by subsequent congressional activity indicating clearly expressed legislative intent contrary to the prior interpretation under review. Thus, in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), the Court noted that a number of its previous judgments (both preceding and following the case overruled, *Monroe v. Pape*) were inconsistent with the rule announced in *Monroe*, and that that rule was "inconsistent with recent indications of congressional intent," as well as "beyond doubt" incorrect as a matter of history. 436 U.S. at 663 n.5, 696, 700. And in *Braden v. 30th Judicial Circuit*, 410 U.S. 484 (1973), the Court noted that subsequent congressional activity had demonstrated that "a number of the premises which were thought to require [the decision in the overruled case] are untenable."

The Court has also overruled a prior decision that departed significantly from earlier decisions and from prior established practice, the results of which were inconsistent with the law established in those decisions. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court overruled a prior decision because its approach to what constitutes a *per se* violation of Section 1 of the Sherman Act "was an abrupt and largely unexplained departure from [the earlier case and was] the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts." Additionally, "[t]he great weight of scholarly opinion" had been critical of the decision, and a number of the federal courts confronted with [the issue] ha[d] sought to limit its reach." 433 U.S. at 44-48.

None of these factors — present not only in the seven cases the Court cited in support of reconsideration here, but in statutory interpretation cases departing from *stare decisis* generally — is present in this case. See Point I *supra*. The principle that schools

should not refuse to admit children on account of race, that employers should not consider race in deciding whether or not to engage or terminate employees, and that swimming pools generally open to the white public should be open to blacks as well, is not at odds with other lines of authority in this Court. There is no discernible congressional policy precluding aggrieved individuals from seeking a remedy for private discrimination. Far from being at odds with national policy as embodied in any other legislation, or repudiated by legislation adopted since the *Runyon* result was foreshadowed in 1968, the non-discrimination principle is national policy, determined by the clear and repeated decisions of the people's representatives and duly enacted into law. See, e.g., *Bob Jones University v. United States*, 461 U.S. at 594-95, and pp. 8-14 above.

Accordingly, there is no occasion even for reconsidering *Runyon* and its predecessors, much less for overruling them.¹⁴

¹⁴ The Court has occasionally relied on additional factors not present in the cases cited in the *per curiam* order here to justify departing from *stare decisis* in statutory cases. See, e.g., *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1140 (1988) (overruling decisions imposing procedural rule where "[a] half century's experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals"); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77-80 (1938) (overruling prior decision which had produced "injustice and confusion" and "an unconstitutional assumption of powers by courts of the United States.") None of these factors supports overruling *Runyon* here.

III

THE POLICIES UNDERLYING STARE DECISIS
COUNSEL AGAINST OVERRULING
RUNYON v. MCCRARY

It is vital that minorities believe that they have a fair forum in which to redress racial discrimination. The principle of *stare decisis* plays an important role in this regard.

As the Court noted in *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403,

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

These three policies strongly militate against overruling *Runyon* and its predecessors.

First, the interest in establishing clear guidelines for conduct would be directly undermined by a decision overruling *Runyon*. *Runyon*'s clear pronouncement that racial discrimination has no place in decisions regarding a wide variety of contracts has presumably had widespread educative and deterrent effect. Overruling *Runyon* would erode the ability of those in

positions of authority in private businesses or associations, or responsible for counseling or advising clients, to resist the inclination of others to engage in discrimination. Overruling *Runyon* would also send the wrong signal to those whose conduct may in fact be proscribed by other federal, state or local anti-discrimination statutes. Some persons would understandably attempt to exercise the new-found right to discriminate on the basis of race.

Overruling *Runyon* would also frustrate the reliance of plaintiffs who may have pursued Section 1981 claims in preference to other possible legal claims because of its perceived procedural advantages, particularly the availability of juries. See *Patsy v. Board of Regents*, 457 U.S. at 501 n.3.

Even more importantly, the reliance of the beneficiaries of Section 1981 argues strongly against overruling *Runyon* and its predecessors. These cases have created settled expectations in the hearts and minds of racial minorities who have been assured that they possess a significant guarantee against racial discrimination. To reverse the decision would undermine that security and betray the hopes of millions. Cf. *Wygant v. Bd. of Educ.*, 106 S. Ct. 1842 (1986) (plurality opinion), *id.* at 1852 (O'Connor, J., concurring in part) and *id.* at 1857 (White, J., concurring) (stressing importance of not undermining settled expectations of white teachers).

Second, the interest in avoiding additional burdens on the justices of this Court, important in any case, must be at its zenith in statutory interpretation cases like this, where revisiting a settled question requires extensive research and analysis of a 120-year old

statute through its legislative history.¹⁷ As this Court's decisions construing Sections 1981, 1982, and 1983¹⁸ and the briefs being submitted in this case demonstrate, such belated interpretation (or reinterpretation) is enormously time-consuming, and ultimately inconclusive. The reasons for the Court to leave any necessary further correction to Congress, decisive in the usual case, are therefore particularly compelling here, especially since Congress has shown great interest in questions of civil rights and no reluctance to revisit statutes which it believes this Court has misconstrued.

Finally, and perhaps most crucially, overruling *Runyon* would threaten "public faith in the judiciary as a source of impersonal and reasoned judgments."¹⁹

Where the interpretation of a statute has arguably been repudiated by Congress, or is inconsistent with conflicting lines of good authority, or has proven unworkable, the occasion for overruling a precedent is self-evident. See *Vasquez v. Hillery*, 474 U.S. at 266.

¹⁷ "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, *The Nature of the Judicial Process* 149 (1921), quoted in *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1459 (1987).

¹⁸ E.g., *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968); and *Monell v. Dep't of Social Services*, 438 U.S. 658 (1978).

¹⁹ *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403. See also *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting) (stare decisis essential to avoid "giving fair ground for the belief that Law is the expression . . . of unexpected changes in the Court's composition and the contingencies in the choice of successors."); *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 601, 632 (1895) (White, J., dissenting).

Objective circumstances, and not merely a change in the Court's composition, warrants the reconsideration.

Departure from *stare decisis* is unwarranted and dangerous, however, precisely to the extent that considerations of that kind are absent. Here, reconsideration has been ordered absent the request of any party, upon the majority's 5-4 *sua sponte* order directing reargument. Congress has not even colorably repudiated *Ranyn*, which to the contrary is demonstrably in accord with existing national policy. (Indeed, Congress has only recently overwhelmingly overridden a presidential veto and thereby effectively overruled one of this Court's statutory civil rights decisions, which had narrowly construed Title IX of the Education Amendments of 1972 so as to narrow the range of racial discrimination by private institutions subject to direct federal oversight.²⁰)

²⁰ In Section 2 of the aptly named Civil Rights Restoration Act of 1987, 42 U.S.C. § 20011(d), overruling *Grain City College v. Bell*, 445 U.S. 574 (1980), Congress expressly found that "certain aspects of recent decisions have unduly narrowed or cast doubt upon [civil rights legislation] and legislative action is necessary to restore the prior consistent and longstanding . . . interpretation . . . of those laws . . ." See also, e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679, 678-682 (1983) (construing legislation overruling *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); *Civil Rights Attorneys' Fees Awards Act*, 42 U.S.C. § 1988, overruling *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1974); *Voting Rights Act*, 42 U.S.C. § 1973, overruling *Mobile v. Bolden*, 446 U.S. 55 (1980); *The Handicapped Children's Protection Act of 1990*, Pub. L. 96-372, 100 Stat. 796, modified at 20 U.S.C. § 1415 (a)(4)(B)-(G), overruling *Smith v. Robinson*, 468 U.S. 992 (1984). Although this Court's opinions historically construed civil rights legislation broadly, like any remedial legislation, to best effectuate its purposes, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971), this canon of construction has all but disappeared from the Court's more recent civil rights decisions.

Under all these circumstances, our obligations as members of the bar of this Court, concerned about its vital position in our system of government and the respect on which its power ultimately depends, compel us to urge on the Court the most deliberate restraint in reaching out to reverse the interpretation of Section 1981 adopted in *Ranyn* and its predecessors. Section 1981, as construed in *Ranyn*, in modern civil rights jurisprudence, and in post-*Ranyn* congressional activity, is a critically important federal statute; and no justification we have seen comes close to justifying overruling *Ranyn* and transforming Section 1981 from a vital instrument of justice into a derelict on the waters of the law.

CONCLUSION

For all the foregoing reasons, the Court should reaffirm *Ranyn v. McCrary*.

Respectfully submitted,

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June 1988

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JUN 24 1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

v.

MCLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
 COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF THE STATES OF NEW YORK, MASSACHUSETTS,
 MINNESOTA, NEBRASKA, OREGON, SOUTH CAROLINA,
 TENNESSEE, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA,
 COLORADO, CONNECTICUT, DELAWARE, FLORIDA,
 GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA,
 KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND,
 MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA,
 NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA,
 NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA,
 RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT,
 VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN and
 WYOMING and the COMMONWEALTH OF PUERTO RICO,
 THE DISTRICT OF COLUMBIA, GUAM and the VIRGIN
 ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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| S. Rep. No. 94-1011, 94th Cong., 2d Sess. reprinted at 1976 U.S. Code Cong. & Admin. News 5908 | 15 |
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INTEREST OF AMICI CURIAE

Amici respectfully submit this brief in support of petitioner Patterson. *Amici* urge this Court to decline to re-examine *Runyon v. McCrary*, and thus reaffirm that § 1981 reaches private discriminatory conduct.

The eradication of racial discrimination remains a national goal of the highest order. *Amici* are the Attorneys General of forty-seven states and of Puerto Rico, Guam, and the Virgin Islands, and the highest legal officer of the District of Columbia. As chief law enforcement officers and representatives of government, *amici* have a strong interest in encouraging the perception of all their citizens that the laws will be administered with even-handedness, and particularly their minority citizens' belief that they can obtain meaningful redress under the law for discriminatory conduct. Moreover, States have an interest in the confidence of their citizens that once a rule of law is in place it will not be taken away absent compelling justification. This interest applies with particular force to the civil rights laws, which are properly characterized as conferring on minority citizens fundamental equality under law which was previously available only to white citizens. Overruling *Runyon* would remove substantial protections, thereby undermining public confidence that government — particularly the courts — will vigilantly enforce legal guarantees of equality.

The substantial progress made in overcoming this Nation's legacy of slavery has been achieved in large part because of the aggressive use by victims of discrimination of federal and state laws guaranteeing equality. Removing § 1981, the Nation's first civil rights law, from the array of available legal remedies for private discrimination could undermine this progress since state laws depend for their full effectiveness on their interaction with, and complementing of, federal law. The gap in available remedies which would be created by overruling *Runyon* would have to be filled by over forty individual States, and while ultimately it could be achieved, confusion and chaos would be the likely immediate result.

The citizens of this country have come to agree that no place exists for racism in the American marketplace. Private discrimination, unredressable by law, corrodes the body politic just as surely

as did publicly sanctioned discrimination in decades past. Amici submit that no compelling reason exists for overruling *Runyon* and that such a reversal would conflict with the prevailing sense of justice in this nation.

The States of New York and Massachusetts, by Attorneys General Robert Abrams and James M. Shannon, joined by Minnesota, Nebraska, Oregon, South Carolina, Tennessee, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Puerto Rico, the District of Columbia, Guam and the Virgin Islands as amici submit this brief pursuant to Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

For two decades it has been clear that 42 U.S.C. § 1981 prohibits private discrimination on the basis of race in the making of contracts. *Runyon v. McCrary*, 427 U.S. 160 (1976), reaffirmed the considered views of this and other courts that Congress intended § 1981 to reach private acts of discrimination.

Though neither the parties to this action nor the Solicitor General had urged a reexamination of *Runyon*, this Court *sua sponte* has suggested that the protections against racial, ethnic and religious discrimination that § 1981 affords might be discarded. Embarking on this course could cause substantial institutional and societal injury because, until now, the law of § 1981 has been settled to the satisfaction of the people as expressed by their elected officials and no compelling reason has appeared to upset it.

Section 1981 provides an array of remedies not available under other federal laws that bolster the efforts by governments and individuals to eradicate racial discrimination in wide ranging circumstances. Encouraged by the Court's broad reading of § 1981, and Congress's endorsement of the Court's construction, individuals and States have so frequently relied upon its protections that it is now a part of our legal fabric.

Adherence to the settled interpretation of the statute conforms with the national commitment to the eradication of invidious discrimination. Overruling it would cause unnecessary chaos and frustrate justified expectations. None of the considerations which have compelled the Court in prior cases to depart from a settled statutory interpretation suggests that *Runyon* needs reexamination. In order to conserve efforts dedicated to thwarting racial discrimination and to preserve the citizens' confidence that this is a nation of laws, this Court should not reconsider *Runyon*.

ARGUMENT

PRINCIPLES OF STARE DECISIS COUNSEL THAT THE INTERPRETATION OF 42 U.S.C. § 1981 ADOPTED BY THIS COURT IN *RUNYON V. McCRARY* SHOULD NOT BE RECONSIDERED

A. Only the Most Compelling Circumstances Justify This Court's Abandonment of Firmly Established Statutory Precedents Since Congress Is Free to Correct Precedents That Are Wrong

Prompted neither by the arguments of any party to this case nor by any pressing doctrinal or social exigency, this Court has asked whether a settled construction of a civil rights statute should be re-examined and jettisoned. Although amici are satisfied that a fresh look at the plain words of the act and at the historical context and legislative debates surrounding its adoption would compel the conclusion that § 1981 reaches private discriminatory conduct, we urge that the injury to society and the judicial system that are likely to attend a reconsideration counsel that this Court should not entertain the inquiry.

"[I]n a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem v. Helm*, 467 U.S. 277, 311 (1983) (Burger, C.J., dissenting), quoting *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983). See also *Phonetele v. ATT*, 664 F.2d 716, 753 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983) (Kennedy, J., dissenting) ("[W]e are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society.") Even as to constitutional questions, "any departure from the

doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 202, 212 (1984) (per O'Connor, J.).

Moreover, the Court has repeatedly recognized that "considerations of *stare decisis* are at their strongest when this Court confronts its previous construction of legislation." *Monell v. Department of Social Services*, 436 U.S. 658, 714 (1978) (Rehnquist, J., dissenting). Indeed, "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas*, 285 U.S. 363, 406 (1932) (Brandeis, J., dissenting). And considerations of *stare decisis* weigh most "heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (per White, J.). Thus, only recently this Court reiterated that there is a "strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Company and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau*, 106 S. Ct. 1922, 1930 (1986). See also *NLRB v. Longshoremen*, 473 U.S. 61, 84 (1985). In order to overcome the presumption, it must "appear beyond doubt" that the Court's earlier interpretations "misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring). See also *Monell v. Dept. of Social Services*, 436 U.S. at 715 (Rehnquist, J., dissenting) (adopting Justice Harlan's standard as "the best exposition of the proper burden of persuasion" and stating "[o]nly the most compelling circumstances can justify this Court's abandonment of ... firmly established statutory precedents.")

These guideposts serve important institutional and societal imperatives. Adhering to *stare decisis* makes it possible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs ..., are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health v. Florida Nursing Homes Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Proper respect for this Court's judgments depends as much upon the appearance that they are rooted in impartial decisionmaking as upon a conviction that they are correct in an abstract sense. Giving

consideration to reversing the construction of a frequently invoked civil rights statute in circumstances where the personnel of the Court, and little else, has changed can undermine the esteem in which the public holds the judiciary.¹ The need for careful preservation of the confidence of citizens in the functions and processes of the Court can never be underestimated. Recent history teaches us that when those outside the Court seek to undermine that confidence, constitutional confrontations and social chaos will beset us. See e.g. *Cooper v. Aaron*, 358 U.S. 1 (1958).²

Continued devotion to a settled statutory construction also ensures that the Court acts properly within its sphere of powers. When the Court considers overruling its construction of a statute, it deals with a coordinate and majoritarian branch of government. That it must when called upon interpret a statute is beyond question. But once it so acts, it should be cautious not to encroach upon legislative functions vested in Congress by Article I of the

¹ Because the five member majority voting to reconsider *Rumsey* is comprised of *Rumsey*'s dissenters and the three members to join the Court since then, the decision in this case is especially noteworthy. The principles of *stare decisis* are therefore particularly compelling here. See generally Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 30 St. John's L. Rev. 445 (1985).

² The rule of law, and not of men, is the very foundation of our constitutional government and it is to the judiciary that its preservation has been entrusted.

[T]he Founders knew that law alone saves a society from being rent by internecine strife or ruled by more brute power however disguised. "Civilization involves subjection of force to reason and the agency of this subjection is law" (Pound, *The Future of the Law* (1937) 47 Yale L. J. 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this nation and designed its Constitution ... To that end, they set apart a body of men, who were to be the depositaries of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige.

Cooper v. Aaron, 358 U.S. at 23-24 (Frankfurter, J., concurring) quoting *United States v. United Mine Workers*, 330 U.S. 258, 307-309 (1947) (concurring opinion).

Constitution.⁸ When, as here, the Congress has ratified the interpretation this Court has placed upon a statute (See Part (B) (2) *post*), the Court, rather than challenging Congress to act again, should adhere to precedent. *Boys Market v. Clerks Union*, 398 U.S. at 258-259; *Monell v. Dep't. of Social Services*, 436 U.S. at 716-17 (Rehnquist, J., dissenting).

Finally, abjuring the opportunity to reconsider long held views about the reach of a statute removes doubts about the continued vitality of other decisions construing similar statutory commands. Certainly, a reversal of the Court's views in *Rumson v. McCrury*, given the analysis the Court there employed in construing § 1981,⁹ could cast doubt on the continued validity of its interpretation of § 1982 in *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968), and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

Interpreting and determining the reach of a civil rights statute, like adjudication of rights secured by the Constitution, often requires the Court to undertake difficult redefinitions and line drawing, tasks that certainly confront the Court in this case as it first appeared here. But, settled rights cannot be jettisoned merely because their vindication in varying factual settings may

⁸ As Justice Black observed in his dissenting opinion in *Boys Markets v. Clerks Union*, 398 U.S. 235, 258 (1970):

[I]t is Congress, not this Court that is elected by the people. This Court should ... interject itself as little as possible into the law-making and law-changing process. Having given our view on the meaning of a statute, our task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment it takes upon itself the function of the legislature.

⁹ In *Rumson*, the Court observed that the view that § 1981 does not reach private acts of discrimination "is wholly inconsistent with *Jones'* interpretation of the legislative history of § 1 of the Civil Rights Act of 1964, an interpretation that was reaffirmed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, and again in *Tillman v. Wheaton-Haven Recreation Assn.*, *supra*. And this consistent interpretation of the law necessarily requires that § 1981, like § 1982, reaches private conduct." 427 U.S. at 173.

be difficult.¹⁰ Were this Court to retract its decisions in every case involving difficult statutory construction, it would introduce intolerable uncertainty not only into civil rights law, but into all our affairs. *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 n.5 (1984) ("The principle of *stare decisis* gives rise to and supports ... legitimate expectations, and where our decision is subject to correction by Congress, we do a great disservice when we subvert these concerns and maintain the law in a state of flux.")¹¹ In a nation founded on the institutions of slavery and dedicated only in the last generation to a policy that would "eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), a retreat from settled practices could be a particularly significant signal for new disorder.

Nothing in this Court's April 25, 1988 order suggests that the Court will be unmindful of the interests served by *stare decisis*. *Patterson v. McLean Credit Union*, ___ U.S. ___ (April 25, 1988) (*per curiam*). Thus, those who would propose a detour "from the straight path of *stare decisis*" in this case bear the "heavy burden" of demonstrating "that changes in society or in the laws dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). While there are circumstances where the need for consistency in the application of the law and stability in society call for a

¹⁰ Indeed, in another context this Court endorsed the view that the withdrawal of protection accorded by statute against private discriminatory conduct was an encouragement to discriminate that violated rights secured by the equal protection clause of the Fourteenth Amendment. *Rothman v. Mulkey*, 397 U.S. 360 (1967).

¹¹ See also, Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735-36 (1949):

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities will be impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society. It is a strong tie which the future has to the past.

departure from *stare decisis*, careful observation leads *amici* to the conclusion that the application of § 1981 to private discriminatory conduct neither conflicts with national policies nor injects any irreconcilable doctrinal conflicts into the law suggesting that *Runyon v. McCrary* needs reexamination.

B. Section 1981 Has Become Part of the Fabric of Legal Protections Afforded Racial and Ethnic Minorities Through Its Interpretation by the Courts, Congress' Ratification of that Construction, and Reliance By Individuals and States

1. This Court's Decisions in Runyon and its Progeny Have Encouraged a Broad Usage of Section 1981.

On at least five occasions⁷ in the last twelve years, this Court has been called upon to give meaning to section 1981.⁸ None of those cases has signalled a retreat from the determination in *Runyon* that § 1981 reaches all intentional racial discrimination, public and private, that interferes with the right to contract. Rather, the Court has consistently stood by that decision and, by applying it in varying circumstances, underscored its broad applicability.⁹

The Court's opinions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon v. McCrary*, 427 U.S. 160 (1976)

⁷ *Goodman v. Lukens Steel Company*, 482 U.S. _____, 107 S. Ct. 2817 (1987); *St. Francis College v. Al-Khaznaji*, 481 U.S. _____, 107 S. Ct. 3022 (1987); *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 100 (1981); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976).

⁸ 42 U.S.C. § 1981 states, *inter alia*:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... as is enjoyed by white citizens ...

⁹ At the same time, the Court has never departed from its determination reached in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that § 1982, the statutory twin of § 1981, reaches private discriminatory interference with property rights. *Shaw-Teele Congregation v. Cobb*, 481 U.S. _____, 107 S. Ct. 3019 (1987); *Memphis v. Greene*, 451 U.S. 100 (1981); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

demonstrate, based upon the language of 42 U.S.C. § 1981 and its legislative history, that the statute prohibits private discrimination in the making of contracts. While the States leave the full exposition of that argument to the Petitioner, we urge the Court to stand by that conclusion. Indeed, each of the questions necessary to the holding that § 1981 reaches private conduct has been "considered maturely and recently" by this Court," *Monell v. Dep't. of Social Services*, 436 U.S. at 714 (Rehnquist, J., dissenting) quoting *Runyon v. McCrary*, 427 U.S. at 186 (Powell, J., concurring).¹⁰

First, the Court in recent times has never intimated that the language of § 1981 indicates a congressional intent to allow private discrimination. The touchstone of statutory interpretation has always been the statute itself. *E.g.*, *Kelly v. Robinson*, 479 U.S. _____, 107 S. Ct. 353, 358 (1987). In discussing the statute from which section 1981 is derived, the Court has twice stated "that the [1866] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law ...," *Runyon v. McCrary*, 427 U.S. at 170 quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 436 (emphasis added). A fresh look at the statute does not alter the conclusion that its plain terms do not limit its reach to state action.¹¹

¹⁰ In *Monell*, an important reason for the Court's holding that the high burden for overruling statutory precedent had been met was that in no prior case had there been a "full airing of all the relevant considerations." *Id.* at 709 n.6 (Powell, J. concurring). While Justice Rehnquist argued that *stare decisis* indicated that the Court should follow *Morse v. Pape*, he did not dispute that the issue had never been fully canvassed. Rather, he contended that other concerns of *stare decisis* predominated. *Id.* at 718. In contrast, the history of both the Act of 1866, as reenacted in 1870 and codified in 1874, and its constitutional underpinnings, received extensive treatment by the majority and dissenters in *Jones* and *Runyon* informed not only by the analysis of the parties but also by sixteen *amici* briefs, including the United States'.

¹¹ Justice White's dissent in *Runyon* obviously reads the statute differently. While he provides support for much of his opinion, his assertion about the language of section 1981 that "what it says" does "no more" than "outlaw[] any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract," *Runyon v. McCrary*, 427

(footnote continued)

Second, the Court has concluded that it was the intent of the Congress that § 1981 reach both private and public racial discrimination in the making of contracts. *Runyon v. McCrary*, 427 U.S. at 169-171; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 459, 460-61; 465-66 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439-40 and n.11. The legislative intent holding has been based upon the plenary review of the historical materials by the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-37. See, e.g., *Runyon v. McCrary*, 427 U.S. at 170-72. The Court's reliance on *Jones*' careful consideration of the legislative history is appropriate, once the origin of § 1981 in the 1866 Act is accepted, since §§ 1981 and 1982 were section 1 of the very same Civil Rights Act of 1866. It is therefore clearly not "beyond doubt" based on the legislative history that prior decisions have been wrong about section 1981. *Runyon v. McCrary*, 427 U.S. at 168-70 and n.8; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. at 286; *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. at 439; *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422 n.28, 441 n.78; see *St. Francis College v. Al-Khazraji*, 107 S. Ct. at 2027; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 300 n.17.

Third, the Court has carefully considered whether § 1981 was enacted pursuant to the Thirteenth or the Fourteenth Amendment and concluded "that section 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982); *Runyon v. McCrary*, 427 U.S. at 168 n.8; *Id.* at 190 (Stevens, J., concurring); *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 441 n.78; see *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. at 439-40. That conclusion has been based on a comprehensive

U.S. at 195 (White, J., dissenting), is conclusory and, at most, points only to an ambiguity in that language. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-425. Surely the Reconstruction era Congress that enacted § 1981, at least, intended to thwart any attempt to reimpose slavery in any guise. It would have expected this broadly worded statute to reach refusals to employ any of the newly freed slaves unless they agreed to conditions of employment that mimicked their prior condition of servitude.

review of the relevant historical materials regarding the origins of § 1981.

Fourth, the Court has been clear, at least since *Jones*, "that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation" ... includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." *Runyon v. McCrary*, 427 U.S. at 179 quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 438 (citation omitted).

In the course of examining the legislative and constitutional underpinnings of § 1981, the Court has applied it expansively to permit its use as a remedy for private discrimination in a wide array of circumstances. Even before the Court decided in *Runyon* that § 1981 can be invoked to redress a race-based denial of admission by a private, commercial, non-sectarian school, all nine members then on the Court agreed that the statute reaches private refusals to enter into employment contracts. *Johnson v. Railway Express Agency*, 421 U.S. at 459 (per Blackmun, J., joined by Burger, C. J. and Stewart, White, Powell and Rehnquist, J.J.) ("[I]t is well settled among the Federal Courts of Appeals — and we now join them — that § 1981 affords a federal remedy against discrimination in private employment on the basis of race"); 468-76 (Marshall, J. joined by Douglas and Brennan, J. J., concurring in part and dissenting in part). In *McDonald v. Santa Fe Trails Transp. Co.*, the Court embraced the conclusion that white persons, like blacks, can invoke its protections because "the Act was meant ... to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. at 295. Four years later, every member of the Court considering whether a claim under § 1981 requires a demonstration of discriminatory intent agreed that the prohibitions of § 1981 "encompass private as well as governmental action" motivated by race. *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. at 387-88 (per Rehnquist, J., joined by Burger, C. J., and White, Blackmun, Powell, O'Connor and Stevens, J.J.); 403-05 (O'Connor, J., concurring); 405-06 (Stevens, J., concurring); 407-418 (Marshall, J., joined by Brennan, J., dissenting).

Only last term, the Court was unanimous that § 1981 forbids all racial discrimination in the making of private contracts when "[b]ased on the history of § 1981" it had "little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *St. Francis College v. Al-Khazraji*, 481 U.S. at ___, 107 S. Ct. at 2028. And again, several weeks later, no Justice disagreed with the conclusion of the plurality in a union membership case that "a collective bargaining agent could not, without violating ... § 1981, follow a policy of refusing to file grievable racial discrimination claims however strong they might be and however sure the agent was that the employer was discriminating against blacks." *Goodman v. Lukens Steel Co.*, 482 U.S. at ___, 107 S. Ct. at 2625.⁹

In addition to giving § 1981 an extensive substantive reach, the Court has woven *Runyon* into other, related areas of law. Thus, when the Court held that a private college that engages in racial discrimination cannot claim a charitable exemption from tax laws because "racial discrimination in education violates a most fundamental national policy", it relied on *Runyon* and other cases. *Bob Jones University v. United States*, 461 U.S. 574, 594 (1983). Similarly, Justices relied on *Runyon*'s recognition that Congress enacted § 1981 pursuant to its powers under the Thirteenth Amendment when sustaining congressional action requiring set-asides for minority business enterprises in federally funded construction programs. See *Fullilove v. Klutznick*, 448 U.S. 448, 500 (1980) (Powell, J., concurring). And, *Runyon*'s holding that Congress has prohibited private discrimination supports the Court's decisions that those who would discriminate in private relations can find no refuge in the Constitution from other legislation forbidding such conduct. E.g. *Roberts v. United States Jaycees*, 468

⁹ Those Justices who dissented from the Court's judgment in *Goodman* holding the union liable for racial refusals to process grievances did so not because of any expressed doubt that § 1981 encompasses such a claim but because on the record presented they could not conclude that the union intended to discriminate against black members. *Id.*, 482 U.S. at ___, 107 S. Ct. at 2633-34 (Powell, J., joined by Scalia and O'Connor, J.J., concurring in part and dissenting in part).

U.S. 609, 628 (1984); *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984). Embarking on an effort to discern anew the intent of Congress 120 years ago would call into question the legitimacy of rights and remedies recently upheld by this Court in some of its most significant decisions.

2. Congress Has Ratified And Relied Upon *Runyon*'s Decision That Section 1981 Prohibits Private Racial Discrimination.

It is now familiar history, chronicled at length in *Runyon*, that Congress has considered and rejected legislation "that would have repealed the Civil Rights Act of 1866 ... insofar as it affords private sector employees a right of action based on racial discrimination in employment." *Runyon v. McCrary*, 427 U.S. at 174 and n.11.¹⁰ The Court was moved by the Senate's rejection of the proposal to observe that "[t]here can hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination." *Id.* (emphasis in original).

Similar ratifications have occurred with other civil rights legislation in subsequent years. In considering legislation to amend the Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691, to prohibit discrimination on the basis of race and other grounds in the granting of credit, the House heard testimony that § 1981 already accorded protection against racial refusals to extend credit.¹¹ Although specifically advised that § 1981 reaches

¹⁰ As explained by the Court, Senator Williams, the floor manager of the bill that was enacted as the Equal Employment Opportunity Act of 1972, described Senator Hruskas' amendment to make Title VII and the Equal Pay Act the exclusive federal sources of relief for employment discrimination as an effort to "strip from [the] individual his rights that have been established going back to the first Civil Rights Act of 1866." *Id.*, quoting 118 Cong. Rec. 3371, 3372 (1972).

¹¹ In hearings on the bill before the Subcommittee on Consumer Affairs of the House Committee on Banking, Currency and Money, Arthur S. Flemming, Chairman of the United States Civil Rights Commission, testified:

Minority groups citizens theoretically would seem to be afforded protection against credit discrimination by the Civil Rights Act of

(footnote continued)

private discriminatory refusals to contract,¹⁸ when the amendments to the Equal Credit Opportunity Act were enacted in 1976, Congress chose not to repeal or modify the judicial construction this and other courts had given § 1981.¹⁹

In 1976, after *Runyon*, Congress again endorsed this Court's construction of § 1981 when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. In explaining the purpose of the amendment as giving the federal courts discretion to award attorneys' fees in suits brought to enforce the civil rights acts which Congress has passed since 1866, Congress specifically observed that the Act of 1866 covered the same ground as later

1866 which forbids discrimination in contractual transactions and declares that all citizens have equal rights to "inherit, purchase, lease, sell, hold, and convey real and personal property." Experience of more than a century however, amply demonstrates that the broad protections of the Civil Rights Act of 1866 are insufficient to effectively guarantee minority citizens equal credit opportunities.

Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency and Money, House of Representatives, 94th Congress, 1st Sess., on H.R. 3386, p. 41 (G.P.O. 1975). In addition, Dr. Flemming testified that the prohibitions proposed in the amendments would overlap with those contained in section 805 of the Fair Housing Act of 1968, 42 U.S.C. § 3605, against racial discrimination in mortgage financing. *Id.* at p. 46 ("Unlike Title VIII of the Civil Rights Act of 1968, H.R. 3386 forbids discrimination based on race ... in all areas of credit, not just mortgage finance.")

¹⁸ At the time Chairman Flemming testified, April, 1975, at least seven circuit courts of appeals had held that § 1981 reaches private race discrimination, see *Johnson v. Railway Express Agency*, 421 U.S. at 459 n.6, and *Jones v. Alfred H. Mayer Co.*, was settled law in this Court.

¹⁹ Congress did, however, require persons aggrieved by housing related credit discrimination to choose between the remedies afforded by the credit amendments and the Fair Housing Act. See 15 U.S.C. § 1601e(i).

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

enacted civil rights statutes and, by making attorneys' fees available, acted to strengthen its protections.²⁰

Congress time and again has ratified the judicial determination that the 39th Congress intended § 1981 to reach private discrimination. *Cf. Lindahl v. OPM*, 470 U.S. 748, 782 n.15 (1985) ("Congress is presumed to be aware of [a] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Indeed, it is apparent that Congress has relied and built on *Jones*, *Runyon* and their progeny in enacting other statutes. If Congress had any inclination to overrule *Runyon*, it has had ample opportunity to do so. Moreover, it has foregone countless opportunities to pass legislation containing protections of the kind § 1981 is understood to contain based on its view that there was no need to enact such a law. Proper deference to congressional endorsements of judicial interpretations of its acts requires this Court to abstain from challenging Congress to act once more.

²⁰ See S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4 reprinted at 1976 U.S. Code Cong. & Admin. News 5908, 5911.

[F]ees are ... suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.

The Senate Report demonstrates Congress' determination to make attorneys' fees available to prevailing plaintiffs in actions under the Civil Rights Act of 1866 to redress private discrimination, and its express approval of the construction of that act to reach private conduct. The Report specifies that the Fees Act would overrule the Court's disapproval of fee awards in cases of private discrimination cited in *Alayaska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 270 n.46 (1975) (disapproving fee awards *inter alia* in *Knight v. Auriello*, 453 F.2d 852 (1st Cir. 1972) and *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) which both permitted fees in actions under § 1982 to redress private housing discrimination). *Id.*, at 5911-12 and n.3.

3. *Individuals and States Have Relied Upon Section 1981 to Secure Redress For Invidious Race Discrimination in Its Myriad Forms.*

Suits under § 1981 to redress racial discrimination are now commonplace; their sheer numbers reflect the centrality of the statute to our legal fabric. The lower courts have developed a body of law interpreting § 1981 that enables individuals to obtain remedies not available under Title VII. That such a development would occur was foretold by the Court's recognition in *Johnson v. Railway Express Agency*, 421 U.S. at 461 that the "remedies available under Title VII and under § 1981, although related, ... are separate, distinct and independent."

While courts fashioning equitable remedies under § 1981 can require relief similar to that available under Title VII, such as hiring, promotion, reinstatement, retroactive seniority and affirmative action,⁸ § 1981 covers all employers, not just those with fifteen or more employees. A § 1981 plaintiff can obtain legal remedies not available under Title VII. "An individual who establishes a cause of action under § 1981 is entitled to ... legal relief, including compensatory, and under certain circumstances, punitive damages." *Id.*, 421 U.S. at 460. Thus, individuals prevailing under § 1981, unlike those pursuing Title VII claims, may recover for the mental distress that results from the racial discrimination.⁹ Courts may award punitive damages for serious violations of § 1981.¹⁰ A backpay award under § 1981 is not limited

⁸ See e.g., *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979); *Campbell v. Gadsden School Dist.*, 534 F.2d 650 (5th Cir. 1976); *Easley v. Anheuser-Busch, Inc.*, 572 F. Supp. 402 (E.D. Mo. 1983), *aff'd in part and rev'd in part*, 758 F.2d 251 (8th Cir. 1985).

⁹ E.g., *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

¹⁰ E.g., *Boufford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, 1108-09 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 259 (1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1425 (7th Cir. 1986); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Clairborne v. Illinois Cent. R.R.*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (5th Cir.), *cert. denied*, 434 U.S. 891 (1977).

to the two year limitation specified for Title VII, *id.*, but rather is governed by the analogous personal injury limitation period provided by the law of the state where the action is commenced. *Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621.¹¹ Moreover, because a § 1981 plaintiff, unlike one pursuing only Title VII relief, may be entitled to legal relief, he can demand a jury trial.¹²

The statute has been employed to redress racial discrimination relating to contracts in numerous contexts other than employment. *Runyon* approved its applicability to private schools and it has since been employed by those seeking to redress discrimination in education.¹³ Individuals have invoked it to vindicate the right to non-discriminatory access to restaurants,¹⁴ clubs,¹⁵ and recreational facilities¹⁶ where the other applicable federal law does not provide for monetary damages. See 42 U.S.C. § 2000a-3. It has been utilized to challenge racial denials of

¹¹ However, there may be individuals who have foregone Title VII actions, which are subject in most instances to a 300-day administrative filing period, see 42 U.S.C. § 2000e-5(e), only to find that the right to federal relief is lost if *Runyon* is overruled.

¹² *Edwards v. Boeing Vertol*, 717 F.2d 761, 763 (3d Cir. 1983), vacated on other grounds, 468 U.S. 1201 (1984); *Setzer v. Newark Inv. Co.*, 638 F.2d 1137 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *Moore v. Sun Oil Co.*, 636 F.2d 154 (6th Cir. 1980).

¹³ See *Riley v. Adirondack Sch. for Girls*, 541 F.2d 1124 (5th Cir. 1976); *Phelps v. Washburn University of Topeka*, 632 F. Supp. 455 (D. Kansas 1986).

¹⁴ See *Wyatt v. Security Inn Food & Beverage, Inc.*, 829 F.2d 69 (4th Cir. 1987) (affirming jury award of \$16,000 in damages); *Hernandez v. Erlendbach*, 368 F. Supp. 752 (D. Ore. 1973).

¹⁵ See *Sullivan v. Little Hunting Park*; *Wright v. Salisbury Club, LTD.*, 432 F.2d 309 (4th Cir. 1980).

¹⁶ See *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Scott v. Young*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Durham v. Red Lake Fishing & Hunting Club*, 666 F. Supp. 954 (W.D. Tex. 1987).

housing opportunities,¹⁷ utility services,¹⁸ and access to roads.¹⁹ Others have sought remedies for racial discrimination in access to insurance coverage²⁰ and medical treatment.²¹ And it has been used by those seeking relief from racial discrimination in commercial ventures,²² franchise relationships,²³ and banking transactions.²⁴

States, like individuals, have invoked § 1981 to redress private racial discrimination. In fact, one of the cases under § 1981 to reach this Court, *General Building Contractors Assn. v. Pa.*, was an effort by a state, acting as *parens patriae*, to seek redress for racial discrimination in private employment. Likewise, New York frequently has proceeded under § 1981 as *parens patriae* for relief

¹⁷ See *Mandible v. H. Walker & Associates*, 644 F.2d 300 (5th Cir. 1981); *Quinones v. Nuccio*, 110 F.R.D. 346 (E.D.N.Y. 1986); *Jimenez v. Southbridge Co-op, Section I*, 626 F. Supp. 732 (E.D.N.Y. 1985); *Bendleton v. Pappas*, 534 F. Supp. 539 (D. Mass. 1982). But see *Spenn v. Colonial Village Inc.*, 602 F. Supp. 541, 547 (D. D.C. 1987) (§ 1981 not available to redress racially discriminatory real estate advertising); *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1052-53 (E.D. Va. 1986) (same).

¹⁸ See *Cody v. Union Electric*, 518 F.2d 978 (8th Cir. 1975).

¹⁹ Compare *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974) with *Memphis v. Greene*, 451 U.S. 100 (1981).

²⁰ See *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972). But see *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984).

²¹ *Hall v. Bio-Medical Application, Inc.*, 671 F.2d 300 (8th Cir. 1982); *Taylor v. Flint Osteopathic Hosp. Inc.*, 561 F. Supp. 1152 (E.D. Mich. 1983).

²² See *Fraser v. Doubleday & Co. Inc.*, 587 F. Supp. 1284 (S.D.N.Y. 1984); *Vietnamese, Etc. v. Knights of K.K.K.*, 519 F. Supp. 993 (S.D. Tex. 1981); *Howard Sec. Serv. v. Johns Hopkins Hospital*, 516 F. Supp. 508, 513 (D. Md. 1981).

²³ See *Quarles v. GMC (Motor Holding Div.)*, 758 F.2d 839 (2d Cir. 1985); *Sud v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974).

²⁴ See *Hall v. Pennsylvania State Police*, 570 F.2d 98, 92 (3d Cir. 1978).

from a pattern and practice of private housing discrimination.²⁵ In addition, both Massachusetts and California provide civil causes of action under state statute²⁶ for conduct violating § 1981 and have used under the statutes to redress acts of racial harassment. The applicability of § 1981 to private conduct has strengthened state anti-discrimination efforts.²⁷

State courts have widely received § 1981 as a means for redressing racial discrimination in private contracts.²⁸ Recently, in *Smith v. United Technologies, Essex Group*, 731 P.2d 871 (Kan. 1987), the Kansas Supreme Court affirmed a jury award of \$55,000 in compensatory and punitive damages to a black employee who sued under § 1981 for his discharge from employment in retaliation for having filed a discrimination charge with the Kansas Commission on Civil Rights. In *Brant Const. Co. v. Lumen Const. Co.*, 515 N.E.2d 868 (Ind. App. 3 Dist. 1987), the court affirmed a determination under § 1981 that a prime contractor, because of race, had interfered with and rendered insolvent a subcontractor's business by wrongfully exercising control over the

²⁵ See e.g., *People of the State of New York v. Merlino*, 88 Civ. 3133 (S.D.N.Y.); *People of the State of New York v. LaRosa Realty, Inc.*, Civ. Action No. CV-85-4459 (E.D.N.Y.) (Judgment for \$15,000 in damages for racial steering); *People of the State of New York v. Mahler Realty*, Civ. Action No. CV-85-4460 (Judgment for \$14,000 for racial steering); *People of the State of New York v. Data-Butterfield Inc.*, Civ. Action No. 80-305 (E.D.N.Y.) (Judgment for \$142,000 for racial steering).

²⁶ See Mass. Gen. Laws Ann. Ch. 12 § 11H, 11I, 11J; Cal. Civil Code § 52.1 (West 1986).

²⁷ In addition, guided in part by *Rumson's* teaching that discrimination in private contracts is proscribed by § 1981, states have initiated race-conscious set-aside programs to create opportunities for minority business enterprises. See e.g., N.Y. Exec. Order 21 (1983); N.Y. Pub. Auth. Law § 1706-c 14(a)(1) (McKinney 1986); N.Y. Transp. Law § 42b(2) (McKinney 1983); N.Y. Unemul. Laws § 6207 (McKinney 1983); Mass. Gen. Laws Ann. Ch. 21A § 30-44 (West Supp. 1986) and Mass. Exec. Order No. 277, Mass. Admin. Reg. 509 (1984).

²⁸ This Court has observed that state courts may entertain claims under the Civil Rights Act of 1960. *Sullivan v. Little Hunting Park*, 396 U.S. at 238.

subcontractor's finances and intimidating the subcontractor's employees into leaving the job site. The subcontractor was awarded compensatory damages for lost profits, punitive damages and attorneys' fees. In *McKnight v. General Motors Corp.*, 420 N.W.2d 370 (Wis. App. 1987), the court set forth standards for the determination under § 1981 of employment discrimination suits in Wisconsin courts. Courts in other states have likewise entertained § 1981 employment discrimination claims.⁸ And state courts have recognized the special role the Civil Rights Act of 1866 plays in assuring equal access to private housing and places of public accommodations.⁹ Section 1981 thus has become in the state courts, as in the federal courts, an important tool for eliminating the badges and incidents of slavery.

Removing § 1981 from the arsenal of civil rights enforcement weapons could, in fact, create gaps in the availability of remedies to redress private discrimination and thereby undermine efforts to eliminate private racial discrimination. Not all of the states have enacted laws prohibiting racial discrimination.¹⁰ In addition, most state fair employment laws, like Title VII, do not cover all employers. The fair employment statutes of twelve states are essentially coextensive with Title VII insofar as they prohibit racial discrimination only by those employers with fifteen or more employees.¹¹ Most other state statutes have jurisdictional limits

⁸ See e.g., *Spencer v. McCrory Moving & Storage*, 330 S.E.2d 753 (Ga. App. 1985); *Callison v. Long*, 694 S.W.2d 740 (Mo. App. 1985).

⁹ See *Mancini v. Wickschke*, 489 So. 2d 274 (La. App. 4 Cir. 1986); *Hawthorne v. Realty Syndicate, Inc.*, 259 S.E.2d 591 (N.C. App. 1979); *Madison v. Churns I*, 454 N.Y.S.2d 226 (Civil Court of City of New York, N.Y. Co. 1982).

¹⁰ Statutory provisions of general application concerning equal employment opportunities are absent in four states. See 3 *Empl. Prac. Guide* (CCH) ¶¶ 30,006 (Alabama), 30,006 (Arkansas), 22,006 (Georgia), 24,006 (Mississippi). Employees not protected by Title VII in these states may have no remedy for racial discrimination in private employment. Additionally, North Carolina and Virginia statutes provide for conciliation of charges of private employment discrimination, but create no causes of action. See N.C. Gen. Stat. § 143-422.1 et seq. (1983); Va. Code Ann. § 2.1-714 et seq. (1987).

¹¹ See Ariz. Rev. Stat. Ann. § 41-1461 (1982); Fla. Stat. Ann. § 780.02 (West 1985); Ill. Ann. Stat. ch. 68, para. 2-101 (Smith-Hurd 1987); La. Rev. Stat. Ann.

(footnote continued)

that approach those contained in the federal law.¹² Not all such statutes provide the comprehensive set of remedies available under § 1981. An overruling of *Runyon* could therefore create a gap in the availability of remedies for racial discrimination in private employment — where none has existed for nearly two decades — that could be filled only by the action of nearly forty state legislatures or Congress. It could without similar legislative reform also leave unredressable racial refusals to contract in many other contexts. See pp. 17-20, *ante*.

While there is no doubt about the power of the states to enact legislation modeled after § 1981 as construed in *Runyon*, the period during which legislatures were acting to do so and administrative agencies were re-tooling to entertain new kinds of charges would certainly be one of confusion or chaos. Overruling *Runyon* would disable an important legal means for obtaining effective relief from discrimination in numerous areas of life. Such a withdrawal of rights would frustrate widely held expectations about the courts' role in redressing racial injustice.

§ 23-1006 (West 1985); Md. Ann. Code art. 49B, § 15 (1986); Neb. Rev. Stat. § 48-1102 (1984); Nev. Rev. Stat. § 613.30 (Michie 1986); N.M. Stat. Ann. § 28-1-2 (Supp. 1986); Okla. Stat. Ann. tit. 25 § 1301 (West 1987); S.C. Code Ann. § 1-13-30 (Law Co-op. 1986); Tex. Rev. Civ. Stat. Ann. art. 5222a (Vernon 1987); Utah Code Ann. § 34-35-2 (1988).

¹² See Cal. Govt. Code § 12926 (West, 1986) (five or more employees); Conn. Gen. Stat. Ann. § 46a-51 (West 1986) (three or more); Del. Code Ann. tit. 19, § 710 (1985) (four or more); Idaho Code § 67-5002 (Supp. 1987) (ten or more); Kan. Stat. Ann. § 44-111 (1986) (four or more); Ky. Rev. Stat. Ann. § 344.030 (Michie 1983) (eight or more); Mass. Gen. L. ch. 151B § 1 (1986) (six or more); Mo. Ann. Stat. § 213.010 (Vernon 1986) (six or more); N.H. Rev. Stat. Ann. § 354-A:3 (1984) (six or more); N.Y. Exec. Law § 292 (McKinney 1982) (four or more); N.D. Cent. Code, chapt. 14-02.4 (ten or more); Ohio Rev. Code Ann. § 4112.01(a)(2) (Anderson 1983) (four or more); Pa. Stat. Ann. tit. Labor-Legal Notice § 954(b) (Purdon 1986) (four or more); Tenn. Code Ann. § 4-21-102 (1985) (eight or more); Wash. Rev. Code Ann. § 49.00.040 (1987) (eight or more); W. Va. Code § 5-11-3(d) (1987) (twelve or more).

C. *The Considerations Which Allow An Overruling of Statutory Precedent Do Not Call For A Reexamination of Runyon*

A review of the decisions in which the Court has overruled prior statutory interpretations reveals that the Court has done so only in those rare circumstances in which adherence to precedent serves to undermine the values of fairness, predictability, stability and efficiency. Historically, the Court has reversed a statutory construction only where changes in society dictate such a departure, where intervening events undermine a precedent's validity or make it difficult to apply, or where application of a prior construction works to deny substantial rights.⁸ These circumstances do not apply to the Court's decision in *Runyon*.

1. *The Court's Construction of Section 1961 in Runyon is Consistent With a National Consensus Favoring the Elimination of Racial Discrimination From All Sectors of Society.*

It is well recognized that "when a rule after it has been duly tested by experience has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment...." B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Application of that policy in this case, however, requires adherence to precedent, since the Court's interpretation in *Runyon* now, more than ever, is consistent with the national policy to eradicate both private and public discrimination.

In *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court recognized that race discrimination violates "deeply and wisely accepted views of elementary justice" and "fundamental public policy." *Id.* at 592-93. There the Court unequivocally held that that public policy applies with special force to educational institutions, even in the private sector:

⁸ See, e.g., *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); *Continental TV. v. GTE Sylvania*, 433 U.S. 36 (1977); *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 308 (1976); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Andrews v. Louisville and Nashville R. Co.*, 406 U.S. 320 (1972); *Boys Market Inc. v. Retail Clerks*, 398 U.S. 235 (1970); *Peyton v. Rowe*, 391 U.S. 54 (1968).

Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life"....

Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination is contrary to public policy.

Id. at 595 (citation omitted). Without question, an integral step in the development of this national policy was the Court's interpretation in *Runyon* that nothing less than non-discrimination in private education would fulfill congressional efforts to effectuate the Thirteenth and Fourteenth Amendments. By overruling *Runyon*, the Court would remove the principal federal rule of law that affords a remedy for discrimination in private education, a result which cannot be reconciled with the Court's historic role in forging a national consensus that racial equality requires equal access to education.

Indeed, in less than two generations, virtually every state has adopted a public policy recognized in judicial or legislative action disfavoring private racial discrimination.⁹ Like the extensive

⁹ See e.g., *Hypert Corp. v. Honolulu Liquor Com'n*, 738 P.2d 1205, 1208-09 (Hawaii 1987); *Brown v. Superior Court*, 691 P.2d 272, 277 (Cal. 1984); *Miller v. C.A. Murr Corp.*, 382 N.W.2d 650, 653 (Mich. 1984); *Maine Human Res. Com'n v. Canadian Pacific*, 658 A.2d 1225, 1229-30 (Me. 1985); *Kentucky Com'n on Human Rights v. Fourn*, 625 S.W.2d 852, 855 (Ky. 1982); *Eastman Kodak v. Fair Empl. Prac. Com'n*, 426 N.E.2d 877, 879 (Ill. 1981); *City of Minn. v. Richardson*, 230 N.W.2d 197, 205 (Minn. 1976); *Evening Sentinel v. NOW*, 357 A.2d 498, 503 (Conn. 1975); *Jackson v. Concord Co.*, 253 A.2d 793, 798-99 (N.J. 1969); *Penn. Human Rel. Com'n v. Chester School Dist.*, 233 A.2d 290, 296 (Pa. 1967); *Neb. Rev. Stat. Ann. § 48-1101* (1984); *N.Y. Exec. Law § 290* (McKinney 1982); *Or. Rev. Stat. Ann. § 650.020*; *Tenn. Code Ann. § 4-21-101* (1983); *S.C. Code Ann. § 1-13-20* (Law Co-op 1986).

array of federal judicial, legislative and executive action taken in the last forty years to eradicate racial discrimination,* these policies testify that the country has come to agree that racial discrimination is intolerable. Overruling *Runyon's* construction of § 1981 would therefore conflict with the prevailing sense of justice in this nation.

2. No Intervening Events Since *Runyon* Undermine Its Validity or Make it Difficult to Apply.

The Court has declined to follow a prior statutory interpretation when subsequent decisions or events have undermined the interpretation's authority to such an extent that its application serves to frustrate important congressional policies. For example, in *Boys Market v. Clerks Union*, 398 U.S. 235 (1970), the Court felt an "urgent need to reconsider its holding in *Sinclair Refining Company v. Atkinson*, 370 U.S. 195 (1962)" to resolve a serious problem created by the Court's intervening decision in *Arco Corp. v. Aero Lodge*, 735, 390 U.S. 537 (1968).

Sinclair held that the anti-injunction provision of the Norris-LaGuardia Act precluded a federal court from enjoining a strike prohibited under a collective bargaining agreement despite provisions in the agreement, enforceable under § 301(a) of the Labor Management Relations Act of 1947, calling for binding arbitration of the underlying grievance. 398 U.S. at 237-38. The Court subsequently held in *Arco* "that section 301(a) suits initially brought in state courts may be removed to the designated federal forum under the federal question removal jurisdiction in 28 U.S.C. section 1441." *Id.*, 398 U.S. at 244. The practical effect of these two holdings was to deprive state courts of jurisdiction in section 301(a) suits because unions, as a matter of course, would remove cases from state court to avoid injunctions against them, a result the Court found to be incompatible with existing case law and congressional purpose. *Id.*, 398 U.S. at 245 ("We are not

* See *Bob Jones University v. United States*, 401 U.S. at 592-96 (cataloguing decisions of this Court, congressional legislation and executive orders in civil rights area). See also, Civil Rights Restoration Act of 1987, P.L. 100-253, 102 Stat. 28 (March 22, 1988).

at liberty thus to depart from the clearly expressed congressional policy to the contrary.').

The Court also considered the intervening societal and Congressional shifts that had taken place since enactment of the anti-injunction section of the Norris-LaGuardia Act in its decision to overrule *Sinclair*. It noted that "congressional emphasis had shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes" through arbitration. *Id.* Only the Court's assessment that the unavailability of injunctive relief undermined the effectiveness of arbitration and impeded the core purpose of the Norris-LaGuardia Act compelled it to overrule its prior reading of the Act in *Sinclair*.⁴

In other instances where the court has departed from precedent, it has done so because experience or passage of time has proved the decision fundamentally flawed or unworkable. The Court has declined to adhere to precedent which thwarts, rather than fosters, predictability and efficiency. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Continental T.V. Inc. v. G.T.E. Sylvania Inc.*, 433 U.S. 36 (1977); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). This principle was cited by Justice Harlan speaking for a unanimous court in *Moragne*, 398 U.S. at 404-05, in which the Court overruled its holdings in *The Harriburg* and *The Tungus* which barred recovery for wrongful deaths at sea:

⁴ There have been other instances where the Court has overruled a precedent because subsequent developments have placed it at odds with important congressional policies. See, e.g., *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 385 (1976) (Court's decision in *Brigg's-Stanton* permitting state regulation of partial strike activities held to be inconsistent with federal statutory scheme in which the use of economic pressure by the parties to a labor agreement is part and parcel of the process of collective bargaining); *Andrus v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) (Court's decision in *Moore v. Illinois Central R. R.* that railroad employees may elect state remedy rather than dispute resolution procedures under the Railway Labor Act frustrates congressional intent that resort to Arbitration Board be considered compulsory). Cf., *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (Court's decision in *The Harriburg*, barring recovery for wrongful deaths at sea, sharply out of keeping with modern maritime law in light of intervening abandonment of the rule in most areas where it once had validity).

[T]he *Harrisburg* ... has become an increasing unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus*, has produced litigation spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication.

Justice Powell relied upon the same principle in *Continental T.V., Inc.*, 433 U.S. at 47-48 to overrule the holding in *United States v. Arnold, Schuinn & Co.*, 388 U.S. 265 (1967), that vertical restrictions by manufacturers on areas or persons with whom a product may be traded are *per se* violations of the Sherman Act:

Since its announcement, *Schuinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The greater weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.

Most recently, in *Monell v. Department of Social Services*, the Court overruled its holding in *Monroe v. Pape* that a local government may not be sued under 42 U.S.C. § 1983 for injuries inflicted solely by its employees, in part, because of the inconsistency of its application. The Court noted: "[t]he principle of a blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such an extension would itself be inconsistent with recent expressions of congressional intent." *Id.*, 436 U.S. at 606.

None of the considerations compelling reexamination in the above cases is applicable to the Court's reconsideration of *Runyon*. No shift in congressional policy or other intervening events have undermined the validity of its holding that § 1981 prohibits discrimination in the private sector. Indeed, the Court in each decision since *Runyon* has reaffirmed, if not expanded, the broad

scope of § 1981. See, pp. 9 to 12, *ante*. And, the workability of the Court's interpretation in *Runyon* and its progeny has been duly tested by over a hundred applications in the lower courts. See pp. 16-20, *ante*; Comment, Development in the Law—Section 1981, 15 Harv. Civ. Rights—Civ. Lib. L. Rev. 29 (1980).

The issues of statutory construction raised by litigants since *Runyon* have been resolved consistent with the spirit of the Act. *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2023 (1987) (definition of race discrimination); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (Section 1981 actions subject to state statutes of limitation for personal injury); *General Bldg. Contractors Assn. v. Pennsylvania*, 458 U.S. 100 (1982) (proof of intent required); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (white persons can invoke statute). Experience has proven the interpretation in *Runyon* to be "so consistent with the warp and woof of civil rights law as to be beyond question." *Monell*, 436 U.S. at 607.

3. This is Not a Situation in Which the Court Must Reexamine a Prior Construction Because its Application Works to Deny Substantial Rights.

The Court's role as the final arbiter of justice confers upon it a special obligation to maintain fairness in the application of a rule of law. Thus, the Court has overruled precedent when its application works to deny substantial rights.

In *Peyton v. Rowe*, 391 U.S. 54 (1968), for example, the Court reconsidered a prior interpretation of 28 U.S.C. § 2241(c)(3) which specifies that a district court may issue writs of habeas corpus on behalf of prisoners who are "in custody" in violation of the Constitution. The issue was whether a federal court can entertain a petition from a prisoner incarcerated under consecutive sentences who claims one or more of the future sentences is a deprivation of constitutional rights. A prior decision, *McNully v. Hill*, 293 U.S. 131 (1934), held that it could not.

In analyzing whether the Court should reconsider *McNully*, Chief Justice Warren, writing for a unanimous court, emphasized the importance of the writ of habeas corpus as a symbol of the

right to individual liberty. The Court found that *McNully* undermined the purposes of the writ because it postponed plenary consideration of issues by the district court and extended, without practical justification, the time a prisoner entitled to release must remain in confinement. The Court concluded that it must overrule *McNully*, *inter alia*, because its holding "... represents an indefensible barrier to prompt adjudication of constitutional claims in the courts." *Id.* 391 U.S. at 55; *see also*, *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

Similarly in *Boys Market, Inc. v. Clerk's Union*, 398 U.S. at 245, the Court overruled precedent where its application had the unintended result of depriving parties of existing rights under state law since "[i]t would be ironic indeed if the very provision that Congress clearly intended to provide additional remedies for breach of collective-bargaining agreements has been employed to displace previously existing state remedies." *Id.*

The circumstances surrounding the Court's reconsideration of *Runyon* bear no resemblance to the circumstances which have compelled the Court to reexamine a prior construction because its application works to deny rights. Overruling *Runyon* would deprive citizens of existing protections and remedies which are not otherwise available. *See pp. 16-21, ante.* Moreover, the injustice that would result to victims of discrimination is not balanced by any legitimate claims by institutions in the private sector to be free from laws that restrain such discrimination. It is now clear that private institutions "simply cannot 'arrange their affairs' on an assumption" that they can deprive citizens of equal opportunities or benefits solely because of their race. *Monell*, 436 U.S. at 700.

We acknowledge the Court's admonition that in its reconsideration of this matter, civil rights litigants are subject to the same principles of *stare decisis* as other litigants and that the Court "should not be influenced by the worthiness of the litigant in terms of extra legal criteria." *Patterson v. McLean Credit Union*, ____ U.S. ____, ____ S. Ct. ____, (April 25, 1968) (per curiam). Indeed, as the Court observed, each Justice of the Court takes a solemn oath to "administer justice without respect to persons,

and to do equal right to the poor and to the rich ..." 28 U.S.C. § 453. *Id.*

Yet, it cannot be seriously questioned that in recent decades the citizens of the states have come to view this Court as playing a special role in protecting the rights of members of minority groups. This prevailing view is based in no small part upon the Court's decisions in *Jones* and *Runyon* which gave new life to the efforts of the 39th Congress to turn the promise of equality into reality for recently freed slaves. However radical those decisions may have been when viewed against the backdrop of the society of 1866, it cannot be doubted that they capture the consensus of a majority of Americans today.

To be sure, the national commitment to the eradication of racial discrimination has also been advanced by legislatures and executives, both state and federal. But the path to that consensus has never been straight and has sometimes been attended by conduct dedicated to obstructing it. It would therefore be unfortunate were this Court to signal a new direction for civil rights by restoring § 1981 through a statutory reinterpretation to a status it occupied when the views of another generation held that Congress lacked power to enact such legislation.* Though the availability of legislative reform of *Runyon's* reversal gives reason for confidence that the commitment to civil rights will continue, no practical wisdom suggests that the commitment needs testing. Accordingly, we urge the Court to let stand its decision in *Runyon v. McCrary*.

* *See Hodges v. United States*, 203 U.S. 1 (1906), overruled, *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 441 n.76; *Civil Rights Cases*, 109 U.S. 3 (1883).

CONCLUSION

For the foregoing reasons, the Court should decline to reconsider the decision in *Runyon v. McCrary*.

Dated: New York, New York
June 24, 1988

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1997

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Fourth Circuit

ON REARGUMENT

**NOTION BY THE AMERICAN JEWISH CONGRESS
AND ONE HUNDRED AND FOURTEEN OTHER
ORGANIZATIONS FOR LEAVE TO FILE AN AMICUS
CURIAE BRIEF ONE DAY OUT OF TIME**

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No. 67-107
IN THE

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OCTOBER TERM 1967

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Respondent.

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STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

MOTION BY THE AMERICAN JEWISH CONGRESS
AND ONE HUNDRED AND FOURTEEN OTHER
ORGANIZATIONS FOR LEAVE TO FILE AN AMICUS
CURIAE BRIEF ONE DAY OUT OF TIME

The American Jewish Congress and one hundred and fourteen organizations hereby request leave to file one day out of time their amicus curiae brief supporting Petitioner in Patterson v. McLean Credit Union. The amicus brief was due to be filed with the Court on June 24, 1988. The amicus brief was transmitted to the Court by Federal Express rather than depositing it in the United States mail on June 24. The brief was received by the Court on Saturday, June 25, 1988. The amicus brief was served on Respondent on June 24, 1988 by telecopy and a messenger service. Thus, granting this motion will not prejudice the Respondent.

Respectfully submitted,

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JUN 30 1988

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Supreme Court of the United States

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BRENDA PATTERSON,

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ON REARGUMENT

BRIEF FOR AMICI

American Jewish Congress, Leadership Conference on Civil Rights, American Civil Liberties Union, American Federation of Labor—Congress of Industrial Organizations (AFL-CIO), American Jewish Committee, Anti-Defamation League of B'nai B'rith, Disability Rights Education and Defense Fund, League of Women Voters of the U.S., Mexican American Legal Defense and Educational Fund, National Association for the Advancement of Colored People (NAACP), National Organization for Women Legal Defense and Education Fund, People for the American Way and Other Organizations.

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Alpha Kappa Alpha Society, Inc.
The American-Arab Anti-Discrimination
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The American Association for Affirmative Action
American Association of University Women
The American Council of the Blind
The American Ethical Union of the
Ethical Culture Societies
The American Federation of Government
Employees, AFL-CIO
American Federation of State, County, &
Municipal Employees
The American Federation of Teachers (AFL-CIO)
The American Nurses Association
Americans for Democratic Action, Inc.
Americans for Indian Opportunities
The American Veterans Committee, Inc.
Asian American Legal Defense and
Education Fund
The Association for Retarded Citizens of the U.S.
ASPIRA
Black Women's Agenda, Inc.
B'nai B'rith Women, Inc.
Business and Professional People
in the Public Interest
Catholics for a Free Choice
The Center for Community Change
The Center for Law and Social Policy
The Children's Defense Fund
The Church of the Brethren—World
Ministries Commission
Citizen Action
The Coalition of Labor Union Women
Common Cause
The Communications Workers of America

The Community Relations Conference of
 Southern California
 Congress of National Black Churches
 The Department of Church in Society,
 Christian Church
 The Federation of Organizations for
 Professional Women
 The General Board of Church and
 Society of the United Methodist Church
 The Human Rights Campaign Fund
 The Indian Law Resource Center
 The International Union of Electronic,
 Electrical, Salaried, Machine and
 Furniture Workers, AFL-CIO
 The International Union, United Automobile
 Aerospace and Agriculture Implement Workers
 of America
 The Japanese American Citizens League
 The Jewish Labor Committee
 The League of Rural Voters Education Project
 The League of United Latin-American Citizens
 The Mental Health Law Project
 The Mexican American Women's
 National Association
 The Migrant Legal Action Program, Inc.
 Minnesota Lawyers International Human
 Rights Committee
 The Minority Business Enterprise Legal
 Defense and Education Fund, Inc.
 The National Abortion Rights Action League
 The National Alliance of Postal and
 Federal Employees
 The National Association for Equal
 Opportunity in Higher Education
 The National Association of Human
 Rights Workers
 The National Association of Social Workers
 The National Bar Association, Inc.

The National Black Caucus of State Legislators
 The National Black Leadership Roundtable
 The National Catholic Conference for
 Interracial Justice
 The National Caucus and Center On Black Aged
 The National Community Action Agency
 Executive Directors' Assn.
 The National Congress for Puerto Rican Rights
 The National Council of Churches of
 Christ in the U.S.A.
 The National Council of Jewish Women
 The National Council of La Raza
 The National Council on the Aging
 The National Council of Senior Citizens, Inc.
 The National Education Association
 The National Federation of Business
 and Professional Women's Clubs, Inc.
 The National Federation of Temple Sisterhoods
 The National Gay and Lesbian Task Force
 The National Jewish Community Relations
 Advisory Council
 The National Legal Aid and Defenders Association
 The National Low Income Housing Coalition
 National Neighbors
 The National Organization for Women
 The National Puerto Rican Forum
 The National Urban League, Inc.
 The National Women's Law Center
 The National Women's Political Caucus
 Opportunities Industrialization
 Centers of America, Inc.
 The Organization of Chinese Americans, Inc.
 The Organization of Pan Asian
 American Women
 The Phi Beta Sigma Fraternity, Inc.
 Planned Parenthood Federation of America
 The Progressive National Baptist Convention
 Project Equality, Inc.

The Puerto Rican Legal Defense and
Education Fund, Inc.
The A. Philip Randolph Institute
The Southern Christian Leadership Conference
The Southern Poverty Law Center
The Synagogue Council of America
The Union of American Hebrew Congregations
The United Church of Christ, Office
for Church and Society
The United States Student Association
The Villers Foundation
The Washington Ethical Action Office
Women Employed
The Women's Equity Action League
The Women's Legal Defense Fund
The Workmen's Circle
The YWCA of the U.S.A.

Question Presented

Whether or not the interpretation of 42 U.S.C.
§1981 adopted by this Court in *Ramsey v. McCrory*, 427
U.S. 160 (1976) should be reconsidered.

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Interest of the Amici

The amici are over 150 national organizations representing millions of Americans, men and women from all walks of life, and numerous races, ethnic groups and creeds. They represent a cross-section of American life. Not surprisingly, these groups often disagree with each other on many of the fundamental issues facing American society.

That they have all come together in support of the principles of equality articulated by this Court in *Ramsey* reflects the degree to which there is fundamental agreement that racial discrimination has no place in American life, public or private, and that no socially desirable end would be served by a repudiation of *Ramsey*.

The specific interests of the individual amici are found in the Appendix.

The brief is filed with the consent of the parties.

Summary of Argument

Ramsey v. McCray, 427 U.S. 160 (1976), is part of a web of judicial decisions and legislation that played a crucial role in condemning and reducing racial discrimination and helped forge a national consensus against it. Building upon *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), those decisions and enactments mark a turning point in the Nation's position on racism, charting a course toward its elimination.

Ramsey has become an integral part of the law; it cannot be excised without doing major harm to the entire fabric of rules that regulate discriminatory behavior and establish the national consensus. This vital development adds decisively to the normal weight of *stare decisis* in this case.

Notwithstanding the well settled policy against discrimination, the unfortunate fact is that discrimination still exists. If the Court were to overrule *Ramsey*, it would be sending a signal that racial discrimination is again legally and morally permissible. Principles of *stare decisis* and fidelity to the Court's special role in purging the Nation of racial discrimination counsel against such an action.

Although amici believe that, as recent scholarship demonstrates, *Ramsey* correctly interpreted the legislative history of §1981, this brief argues that *stare decisis* would be in any event sufficient ground for reaffirmance. *Ramsey* raised the question of statutory interpretation directly; the presentations were thorough; the social context in which the case was decided—specifically the activities of schools, many of them set up to avoid mandatory busing for integration purposes—made clear that the decision would be sweeping in its social impact.

Where a challenged rule is as well considered and well settled as that of *Ramsey*—itself not a startling departure from prior decisions, but a logical development from *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and its progeny—the challenger bears the heavy burden of persuading the Court, beyond doubt, that “it has misread the relevant statute and its history.” *Pattly v. Florida Board of Regents*, 457 U.S. 496, 517 (1982) (White, J. concurring). That showing is not made here.

Even if the Court does not view the legislative history as dispositive, where the questioned precedent has become a basic building block in the law and the legislative branch has relied and built upon it, as is the case here, *stare decisis* ought to control.

Stare decisis always carries special weight in matters of statutory construction, for Congress is free to change the Court's interpretations of a statute. Its failure to do so imports approval of the judicial construction. That is particularly true in the civil rights field, because civil rights decisions are uniquely visible, given the definitional role they play in society. The Court's interpretations of civil rights statutes have been revisited frequently by Congress, and frequently reversed when found to have placed too narrow a construction on those statutes.

Congress has not overturned *Ramsey*, but instead has knowingly accepted and ratified it, incorporating it into subsequent legislation. Thus, the evidence of Congressional ratification is substantial. Even before *Ramsey* had been decided, but in the aftermath of *Jones*, the Congress refused to make Title VII of the 1964 Civil Rights Act the exclusive remedy for employment discrimination. The proponents of doing so were seeking to repudiate lower court decisions which, in light of *Jones*, had read §1981 as creating a parallel, but independent, remedy. Their successful opponents determined that Congress ought not to abolish a 100-year-old remedy for racial discrimination, and that it was in any event appropriate to allow victims of racial discrimination a choice of remedies.

Several years later, Congress again treated *Ramsey* as part of the body of civil rights law when it incorporated it into legislation enacted in response to *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240 (1975), allowing courts to award attorneys fees in cases brought, *inter alia*, under §1981.

Congress is not alone in treating *Ramsey*'s interpretation of §1981 as a settled aspect of the law of civil rights. This Court has done so as well. The *Ramsey* holding was foreshadowed in *Jones v. Alfred H. Meyer Co.*, 392 U. S. 409 (1968) and made explicit in *Tillman v. Wheaton-Haven Recreation Association*, 410 U. S. 431 (1973), and *Johnson v. Railway Express Agency*, 421 U. S. 454 (1975). Since *Ramsey*, the Court has repeatedly applied §1981 to private conduct. But the Court has not limited its use of *Ramsey* to direct applications to discriminatory conduct. It was cited in *Bob Jones University v. U. S.*, 461 U. S. 574, 593 (1983), as evidence of a "fundamental national policy against racial discrimination in private education."

Yet another indication that *Ramsey* is inextricably interwoven into the fabric of the law is the extent to which it is cited by the lower courts. The clear development of the law has led parties, in reliance on *Ramsey*, to forego Title VII remedies in favor of §1981. Overruling now would dash their legitimate expectations in a way that "would be intolerable," as Judge Cardozo put it.

Stare decisis reflects a judgment that the very fact of change in a rule of law has a social impact that must be justified by the incremental benefits of the new rule over the old. Where, as in this case, it is the existing rule that serves the higher social objectives, there is no reason to discard the old rule.

There are, of course, occasions for departing from *stare decisis*. The existing rule may come to be unacceptably at odds with the body of law to which it relates. It may come to disserve rather than to serve agreed goals of the law. But no one contends, or could contend, that any such occasion for overruling is present with respect to *Ramsey*.

The critical end served by *Ramsey* is the full social and economic equality of racial minorities. That goal is as urgent now as it was in 1976, and indeed in 1966. This the most powerful kind of occasion for applying *stare decisis*.

ARGUMENT

I.

THIS COURT'S DECISION IN *BUNTON* CONSTITUTES AN INTEGRAL PART OF NATIONAL LEGAL PROTECTIONS AGAINST RACIAL DISCRIMINATION

When this Court requested the parties to brief and argue whether or not its interpretation should be reconsidered, it necessarily invoked consideration not merely of a narrow issue, but of the impact that a change of legal position would have on society. See, *Helvering v. Griffith*, 318 U.S. 371, 400 (1942).

The decision of this Court in *Ramsey v. McCary*, 427 U.S. 560 (1975) as well as its decision in the prior case of *Jones v. Alfred H. Meyer*, 312 U.S. 409 (1940), giving life to the 1866 Civil Rights Act, must be viewed in context. They were not isolated occurrences but rather part of what has become a comprehensive structure of law including new statutes and regulations designed to guard against discrimination in both the public and private spheres, adopted in the period following this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

For much of this century, this Court has struggled to make real the promise of the Declaration of Independence—that all men are created equal—a promise that was broken as early as the Constitution's compromises on slavery. The most dramatic turning point in that struggle was the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), marking the end of the reign of separate-but-equal, and a return to the promise of the Reconstruction-era Amendments.

To be sure, this national policy of eradicating racial discrimination has eliminated many of the most odious forms of insidious discrimination. Blacks, and Mexican Americans too, can along with Whites now be born in the same hospitals, eat at the same lunch counters, relieve their thirst at the same drinking fountains, ride together on public transportation, and be buried in the same cemeteries.

From the 1860's on, a national consensus emerged that racial discrimination is intolerable. Court decisions have been rein-

forced by legislative action at the national and state levels. For "the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." *Bob Jones University v. U.S.*, 461 U.S. 574, 593 (1983).

That legislative and judicial activity worked a major transformation for the better in attitudes towards racial equality. But as evidenced by a substantial body of case law under the various anti-discrimination statutes, studies of public opinion and the continuing disparity between blacks and whites in educational and economic status, there remains a substantial gap between acceptance of principles of non-discrimination in theory and their implementation in practice. Although the frequency of officially countenanced discrimination which existed a third of a century ago has diminished substantially, racial discrimination remains a present day reality. Much existing racial discrimination is reflected in the cases on this Court's docket during the 1980's. These cases include judicial findings of racial discrimination in private employment as well as in public employment, racial discrimination in recalcitrant efforts to stem school desegregation, racial discrimination even in parental custody determinations, and racially discriminatory denials of the right to vote. "It would ignore reality to suggest that racial and ethnic prejudice do not exist or that all manifestations of those prejudices have been eliminated." *Pulmore v. Siden*, 466 U.S. 429, 433 (1984).

These continued "manifestations" are cautionary signs. They warn against any suggestion by the Court that certain forms of racial discrimination are no longer unacceptable. A suggestion of this sort from this Court would do great harm to the national consensus that racial discrimination is morally repugnant.

We have approached in light of this Court's leadership in the struggle for racial equality the question now posed by the Court: "Whether or not the interpretation of 42 U.S.C. §1981 . . . in *Ramsey* . . . should be reconsidered . . ." Guided by that light, we believe it to be clear that the question calls for a negative answer. This submission is supported by a series of intermediate conclusions.

- (1) There are no changed factors since the thoroughly considered *Rumson* decision that could warrant overruling.
- (2) The acceptance by Congress of both *Jones v. Alfred H. Mayer Co.*, *supra*, and *Rumson v. McCrury*, *supra*, together with the extensive jurisprudence predicated upon those decisions by this Court and the lower federal courts, adds significant momentum and weight to the claims of *stare decisis*.
- (3) The usual weight of *stare decisis* is enhanced in this case by a matured judicial and social consensus on the principles of racial equality to which the Court's jurisprudence for almost a half-century has been both a major impetus and a continuing response.
- (4) No changes in the social conditions addressed by 42 U.S.C. §1981 or any other pertinent legal circumstances diminish the force of *stare decisis* in this case.

In discussing these interrelated subjects, this brief proceeds upon the premise that *Rumson v. McCrury* was not a startling or unexpected departure from prior decisions, but instead grew out of *Jones v. Alfred H. Mayer Co.* and its progeny. While the cases are arguably distinguishable from each other, *Rumson v. McCrury*, *supra*, 427 U.S. at 213 (White, J., dissenting), it does not follow, even on that view, that the Court may now focus on *Rumson* alone.

The connectedness of *Jones* and *Rumson* in the decisional process, and the fact that in the intervening years the two cases have been understood by the Congress, the courts, and the public at large as giving rise to a common web of rules barring private racial discrimination, and as enunciating a "fundamental national public policy against racial discrimination," *Bob Jones University v. U.S.*, *supra*, 461 U.S. at 593-94, suggest that the Court, in pursuing the inquiry on which it has embarked, will find it essential to consider *Rumson* against the larger background of *Jones* and related cases.

II.

STARE DECISIS APPLIES WITH COMPELLING FORCE TO SUSTAIN THIS COURT'S PRIOR CONSTRUCTION OF THE CIVIL RIGHTS ACT OF 1866

A. The Decisions in *Jones* and *Rumson*, Correct and Important When Made, Would Stand on the Ground of *Stare Decisis* Even if they Were Doubtful.

Many of the *amici* here filed briefs in *Rumson* and *Jones* urging that the Court construe §1981 and §1982 to apply to private conduct. All of the *amici* continue to believe that *Rumson* correctly construed that statute and its legislative history.

We submit that the decisions were and are sound for our time in every essential respect. Supporting, without repeating, the arguments on the merits of those cases by petitioner herein, we note that historical as well as legal scholarship continues to support this Court's conclusion that the Civil Rights Act of 1866 was understood by contemporaries to reach private racial discrimination, so that in the years following passage

judges rejected attempts of defense attorneys to read into the Civil Rights Act an interpretation that limited its application to cases in which rights were infringed by some form of racially discriminatory state action. Federal jurisdiction was applied whether or not state discrimination was involved

R.J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* (1985) at 8-9.¹

To be sure that conclusion has been questioned. Beyond the dissents in both *Jones* and *Rumson*, Justices have criticized the decisions retrospectively, but then gone on to accept them as vital constructions of basic statutes withdrawn from judicial reconsideration by force of *stare decisis*. See *Rumson*, 427 U.S. at 186 (Powell, J., concurring); *id.* at 189-90 (Stevens, J., concurring).² This ultimate conclusion—that time and circumstances have

¹ See also brief *amici curiae* of C. Vann Woodward, et. al.; Gibbons, Book Review, 62 N.Y.U.L.Rev. 1379 (1987).

² As noted below, see Point II, c, even the dissenters in *Jones* and *Rumson* have joined, even authored, opinions applying those decisions to new circumstances involving private acts of racial discrimination.

made *stare decisis* the dispositive principle on this occasion—has our primary and vigorous support in this brief.

The claims for *stare decisis* are made now for decisions that followed thorough presentations. The Court's responses to those presentations were thorough. The outcomes were, to say the least, logical and enlightened interpretations, now woven into the fabric of our statutory law.

The determination in *Rumson* that §1981 bars private racially motivated refusals to contract was certainly not a casual, incidental or subsidiary holding. The first contention made by petitioner *Rumson* was that:

42 U.S.C.A. §1981 Has No Application To Private Conduct. Congress Never Intended To Infringe on Private Acts. The Contract Clause of §1981 Does Not Prohibit Private Discrimination.

Brief of Petitioner *Rumson* at 2. Each of the parties and most of the amicus briefs, including that of the United States, devoted substantial attention to the legislative history of the Civil Rights Act of 1966.

The setting in which those submissions were made could only have heightened the importance of the disputed history. The *Rumson* cases were filed shortly after the Court had upheld busing as a remedy for school segregation, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In many parts of the country segregated private academies threatened to undermine successful integration of the public schools. Thus, *Rumson* stirred questions of the widest public interest. The Court's holding that §1981 did reach private conduct and could be applied to private schools was foreseeably sweeping in its impact. And undoing *Rumson* would have a likewise foreseeably sweeping impact, in the first instance by sanctioning discrimination by private schools.

In cases such as this, where a well settled rule of law is challenged on the ground that the Court originally misapprehended the meaning of the statute, a challenger bears a particularly heavy burden of proof. Members of this Court have suggested various formulas to determine when the Court may overrule one of its statutory precedents. Justice Harlan, concurring in *Monroe v. Pape*, 365 U.S. 167, 192 (1961), wrote that before overruling would

merit consideration it must "appear beyond doubt from the legislative history . . . that [the Court] misapprehended the meaning of the controlling provision."⁹

Recently restated by Mr. Justice White, the sound principle is that to warrant overruling "in a statutory case, a particularly strong showing is required that [the Court has] misread the relevant statute and its history." *Pattyn v. Florida Board of Regents*, 457 U.S. 496, 517 (1982) (concurring opinion). Under neither formulation is overruling of *Rumson* justified.

Even if the Court does not regard petitioner's showing on the legislative history as sufficient to dispel all doubt about the meaning of §1981, reexamination of *Rumson* is nevertheless not appropriate. As Justice Harlan observed in *Monroe*, matters of disputed legislative history, such as those canvassed in the several opinions in *Rumson*, are clear occasions for recalling and applying Justice Brandeis' wise observation that "in mos., matters it is more important that the applicable rule of law be settled than it be settled right." *Burner v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting).

That is compellingly sound for a case like this one, where the questioned precedent has become a basic building block in the law and the legislative branch, primarily responsible for the rule, and authorized to change it, has instead relied and built upon this Court's interpretation.

B. Congress Has Approved and Built on this Court's Decision in *Rumson*

"[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this

⁹ Both the majority and the dissenters in *Monell v. Department of Social Services of New York City*, 436 U.S. 658, 700 (1978), appeared to accept Justice Harlan's test as appropriate, although the majority was less certain as to its correctness than was Justice Rehnquist in dissent. See, 436 U.S. at 700 n. 65, 715 (Rehnquist, J., dissenting). A portion of *Monroe's* reading of 42 U.S.C. §1983 (whether a municipality was a person for purposes of that statute) was overruled in *Monell, supra*. Justice Harlan's remarks, however, were not directed to this issue, but the "under color of state law" issue raised in *Monroe*. At Point IV, B, *infra*, we explain why the *Monell* result is consistent with *stare decisis*, but overturning *Rumson* is not.

Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Burner v. Coronado Oil & Gas Co.*, *supra*, 285 U.S. at 406-08 (Brandeis, J., dissenting).⁶ The failure of Congress to change the law in response to the Court's decision must be taken as an indication "that the interpretation of the Act then accepted has legislative approval," *U.S. v. Elgin, Joliet & Eastern Railway Co.*, 298 U.S. 492, 500 (1936).

If the *Jones* and *Ramsey* decisions were in some obscure area of the United States Code, it might be unrealistic to treat the Congress' theoretical power to overrule as an affirmative acceptance of the Court's interpretation. Civil rights decisions like these, however, are uniquely visible, for they go to the heart of the society's conception of itself and of the relation of its members to the whole and to each other. In the decade since *Ramsey* was decided, Congress has repeatedly intervened to overturn decisions of this Court construing civil rights statutes narrowly.⁷ The contrast with the acceptance of *Ramsey* is striking and significant.

There is no need in this regard to rely on speculation or presumption, or to construe the silence of Congress, for Congress has on more than one occasion knowingly accepted and ratified this Court's construction of the 1866 Act in *Ramsey* and *Jones* as reaching private discrimination. In such circumstances, *stare decisis* has special force, *Square D. Co. v. Niagara Frontier Tariff*

⁶ Accord *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61 (1985); *Gulf, Colorado and Santa Fe R. v. Moss*, 275 U.S. 133 (1927).

⁷ See Pregnancy Discrimination Act of 1978, Pub.L. 95-555, 92 Stat. 2076, codified at 42 U.S.C. 2000e(k), overturning *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); Voting Rights Act Amendments of 1982, Pub.L. 97-205, 96 Stat. 131, codified at 42 U.S.C. §1973, overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980); Civil Rights Restoration Act of 1988, Pub.L. 100-259, 102 Stat. 28, codified at 42 U.S.C. §2000d, overturning *Grove City College v. Bell*, 465 U.S. 555 (1984); Handicapped Children's Protection Act of 1986, Pub.L. 99-372, 100 Stat. 796, codified at 20 U.S.C. §1415(e)(4)(B)-(G), overturning *Smith v. Robinson*, 468 U.S. 992 (1984); of Civil Rights Attorney's Fees Award Act of 1976, Pub.L. 94-559, 90 Stat. 2641, codified at 42 U.S.C. §1988, overturning *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Bureau, Inc., 106 S.Ct. 1922, 1928-29 (1986); *Pattay v. Florida Board of Regents*, *supra*.

The first major decision came between the decisions in *Jones* and *Ramsey*, when Congress considered amendments to strengthen Title VII of the 1964 Civil Rights Act. In the course of its deliberations, an amendment was offered to make Title VII the exclusive remedy for employment discrimination. Eliminating the "redundant" remedy under the 1866 Civil Rights Act, the proposal would have left §1961 otherwise intact. See H.R. Rep. No. 218, 92nd Cong., 2nd Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2175 (minority views); 118 Cong. Rec. 3172-73 (1972) (remarks of Sen. Hruska).

The proposal was rejected both in the Senate Committee and on the floor. The floor manager of the bill, Senator Williams, explained the objection to the proposal when it came to the floor for consideration:

It was recently stated by the Supreme Court in the case of *Jones v. Meyer*, that these acts [including the Civil Rights Act of 1866] provide fundamental constitutional guarantees. In any case, the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

...

The peculiarly damaging nature of employment discrimination is such that the individual, who is frequently forced to face a large and powerful employer, should be accorded every protection that the law has in its purview, and that the person should not be forced to seek his remedy in only one place.

118 Cong. Rec. 3371, 3372 (1972).⁸ The amendment failed, at first in a tie vote, and, one week later, on a motion to reconsider, by a vote of 50-37, 118 Cong. Rec. 3965 (1972). In opposing the motion

⁸ Accord S. Rep. No. 93-415, 92nd Cong., 1st Sess., at 24 (1971) (additional enforcement powers to EEOC not in derogation of existing civil rights statutes).

to reconsider, which opponents urged be treated as a decision on the merits, 118 Cong. Rec. 2961 (remarks of Senator Javits). Senator Williams argued against making Title VII the exclusive remedy for employment discrimination on the ground that it was inconceivable that Congress would abolish an existing remedy for illegal discrimination: "For 100 years, there has been built a body of law dealing with the rights of individuals that would be wiped out."

The House of Representatives, which, in response to lower court decisions granting a cause of action under §1981 for private discrimination, had earlier adopted the exclusivity provision by a narrow margin, 117 Cong. Rec. 32, 111-12 (1971), ultimately accepted the Senate's view that it was inappropriate to repeal the 1964 Civil Rights Act. *Conference Report on H.R. 1746, The Equal Employment Opportunity Act of 1972*, H.R. Rep. No. 92-899, 92d Congress, 2d Sess. (1972).

Both sides, without the benefit of *Ramsey*, assumed that §1981 applied to private conduct—indeed, that it had always so provided—and no one questioned that it ought to be so applied outside the employment field.

A further indication that contemporary Congresses have assimilated the *Lower-Ramsey* reading of the 1964 Civil Rights Act as the grounding for subsequent lawmaking is the Civil Rights Attorneys' Fees Awards Act of 1976, codified as 42 U.S.C. §1988. That Act was the legislative response to *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which had reaffirmed the traditional American rule against the award of attorneys' fees absent statutory authorization. The Alaska Court criticized a series of lower court decisions granting attorneys' fees under various statutory provisions, including the 1964, 1971, and 1975 Civil Rights Acts, 421 U.S. at 270 n.46.

Not surprisingly, when the Congress overturned *Alaska*, it listed, *inter alia*, §1981 as a statute under which fees could be awarded. It described the class of §1981 cases in which fees could be awarded as those challenging private employment discrimination and discriminatory refusal to admit blacks to private recreational facilities. The relevant committees cited *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Tillman v. Wheaton-*

Haven Recreation Association, 410 U.S. 431 (1973), in support of these conclusions, *see*, H.R. Rep. No. 1558, at pp. 3-4 n.8; S. Rep. No. 1011, at pp. 3-4, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code, Cong. & Admin. News 5908, 5910-12. The Senate Committee explained:

[The *Alaska*] decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alaska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. §1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. §1982, a Reconstruction Act protecting the same rights."

The decision to overturn *Alaska* in regard to §1981 was predicated upon the importance Congress attached to the availability of that statute as a vehicle for eliminating private racial discrimination. As stated by one of the Act's sponsors:

[w]hen Congress calls upon citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court." (emphasis added)

122 Cong. Rec. 33313 (1976) (remarks of Senator Tunney). Overturning *Ramsey* would frustrate this Congressional policy.

This is a case, then, like *Perry v. Florida Board of Regents*, *supra*, where answers to two key questions counsel against overruling—"whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent. . . ." 457 U.S. at 501.

Even where the conclusion favoring stare decisis on the "history alone is somewhat precarious" (*id.* at 507), which is not the case here, it draws commanding strength when it accords with

"recent congressional activity in [the] area" (*id.* at 502). Here, as in *Patty*, to alter the statutory construction which has been well known to Congress and accepted as a premise for both action and inaction by the legislators would "usurp policy judgments that Congress has reserved for itself." *Id.* at 508.

It bears emphasis, with the utmost deference, that Congress has gone along—legislating and not legislating—with *Jones* and *Ramsey* as notable parts of what the statutory law of civil rights means. A decent respect for that coordinate branch counsels against the partial, piecemeal, disruptive change that an overruling would now effect. The joint enterprise of legislating and interpreting has moved 20 and 12 years, respectively, beyond *Jones* and *Ramsey*. Congress has not merely acquiesced in those decisions, but has built upon them and around them. Overruling *Ramsey* would amount to a legislative revision that Congress has rejected.

C. *Ramsey* and *Jones* Have Become Integral Parts of the Decisive Law

1. *Ramsey* and *Jones* in the Decisions of this Court

Ramsey followed the authority of *Jones v. Alfred H. Meyer Co.*, *supra*, which held that 42 U.S.C. §1982, the real property counterpart of §1981, barred private acts of racial discrimination. There were hints already in that case foreshadowing the ruling in *Ramsey*, 392 U.S. at 422 n.20; *id.* at 442 n.78. Subsequently, in two cases, the Court, without extended discussion, applied the *Jones* holding—that the Reconstruction-era Civil Rights Act reached private activity—to §1981.

In *Tillman v. Wheaton-Haven Recreation Ass'n*, *supra*,⁷ the Court held that "[i]n light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently . . ." *Id.* at 439-40. That holding was necessary to resolve the discrimination claims of black visitors to a private swim club who were denied entry but were not denied the right to "purchase, lease . . . [or] hold real property", and so could not invoke §1982.

⁷ *Tillman v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a case factually similar to *Tillman*, was brought under both §1981 and §1982. The Court, having found a violation of §1982, did not discuss §1981.

Two years later, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court considered the relationship of Title VII to §1981 as applied to discrimination in private employment. The Court noted its specific approval of a long line of appellate holdings (based primarily on the decision in *Jones*) that "§1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.* at 459-60. By analogy to *Jones*' holding that 1962 was independent of Title VIII, 42 U.S.C. §3601 *et seq.*, it held that §1981 gave a remedy independent of Title VII, 42 U.S.C. §2000e *et seq.*

Against this legal background, *Ramsey* can hardly be said to have been a departure from earlier holdings or an aberration. Indeed, as the majority and concurring opinions made clear, the decision in that case followed from *Jones*, *supra*, *Tillman v. Wheaton-Haven Recreation Ass'n*, *supra*, and *Johnson v. Railway Express Agency, Inc.*, *supra*. It is difficult to see how the Court could determine that one decision should be overruled without implicating and jeopardizing the entire line of cases.

The application of §1981 to private conduct did not begin with *Ramsey*, nor did it end there. On the contrary, since 1976, the Court has continued to apply that rule to private discrimination, starting with *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), based on the basis of *Ramsey*. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 n.17 (1982), again applied §1981 to private discrimination, specifically reaffirming *Ramsey* in the process.

In both *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987), and *St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987), the Court, in opinions by Justice White, again applied §1981 to private employment discrimination. Underscoring the close "historical interrelationship between §1981 and §1982," *Tillman v. Wheaton Recreation Ass'n, Inc.*, *supra*, 410 U.S. at 439-40, the holding in *St. Francis College*, that §1981 embodied a broader

⁸ See, e.g., *Waters v. Wac. Steel Workers*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970); *Long v. Ford Motor Co.*, 496 F.2d 500 (8th Cir. 1974); *Martin v. Spence Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Brady v. Brand-Meyer, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dining Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); *Young v. I.T.T.*, 438 F.2d 757 (3rd Cir. 1971).

concept of race than current anthropological theories, was then held controlling in a companion case brought under §1982, *Shaw v. Telfie Congregation v. Cobb*, 307 S.Ct. 2019 (1987).

The impact of *Rumson* has spread far beyond the confines of litigation about whether §1981 has been violated. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Powell, whose vote was crucial to the result, explicitly referred to §1981, as construed in *Rumson*, as supporting authority for the Congressional decision to mandate race conscious set-asides. 448 U.S. at 500; *id.* at 506. For him, the existence of widespread illegal discrimination in both the public and private⁹ sectors, was a *sine qua non* of upholding the set-aside. As to private contracting, §1981, with the *Rumson* gloss, created the requisite illegality.

Rumson has been understood as standing for far more than a narrowly legal proposition. In *Bob Jones University v. U.S.*, *supra*, 461 U.S. at 593-94, *Rumson* was cited as evidence of a "fundamental national public policy" against racial discrimination in private education. Overruling *Rumson* would make such discrimination legal, and would thus announce law at odds with "fundamental national policy."

2. *Rumson* and *Jones* in the Lower Courts and the Reliance of those Suffering Discrimination

The impact of *Jones* and *Rumson* is not limited to the work of this Court. Even the briefest glance at Shepard's Citations or a computer print-out of Lexis or Westlaw will disclose the extent to which these cases have become embodied in the daily work of the lower federal and state courts, and an element of the national campaign against racial discrimination. The citations also evidence the extent to which a body of law has led the public at large to rely on the *Jones-Rumson* line of decisions. *Stare decisis* protects such settled expectations. *Vasquez v. Hillery*, 390 S.Ct. 617 (1968); *Holmberg v. Goffin*, 318 U.S. 371, 400, 404 (1943).

In employment discrimination cases, which constitute the bulk of the reported §1981 cases in the lower courts, §1981 differs in several respects from Title VII: immediate access to court, po-

⁹ In 1980, private construction constituted almost 80 percent of the value of all construction. 1987 *Statistical Abstract of the U.S.* at 705 (Table 1283).

sitive and compensatory damages (particularly important in hostile environment cases, where backpay is not appropriate), jury trials, and, in many states, a longer statute of limitations. *Johnson v. Railway Express Agency, Inc.*, *supra*. It applies to employers of firms hiring less than 15 employees. Those who might otherwise prefer to take advantage of the Equal Employment Opportunity Commission's conciliation processes may be deterred by long delay and errors by the Commission.¹⁰ See *Staff Report on the Investigation of Civil Rights Enforcement By the E.E.O.C.*, Serial No. 99-Q, House Committee on Educ. and Labor, 99th Cong. 2d Sess. (May 1986). On the other hand, Title VII offers a lower standard of proof, and the availability of E.E.O.C. investigation, conciliation, and enforcement. The remedies are independent and complementary; and by Congressional choice, the election of remedy is for the plaintiff.

If the Court were to reverse *Rumson*, parties who have relied upon §1981 procedures and remedies, some of them having foregone redress available under Title VII, would find themselves without remedy. The "injustice and oppression" inherent in the disappointment of legitimate reliance on *Rumson* by lawyers and their clients "would be so great as to be intolerable." B. Cardozo, *The Nature of the Judicial Process* (1921) at 147.

Jones and *Rumson* are much more than illustrations of what Justice Douglas described when he referred to *stare decisis* as "a strong tie which the future has to the past," *Stare Decisis*, 49 Colum. L.Rev. 735, 736 (1949). With effects radiating beyond their specific holdings, these precedents have helped to build and sustain the "fundamental national public policy" against racial discrimination in legal relationships, public or private.

To group them out of the body of the law could not work neatly as micro-surgery, excising only two "cases." The overruling would cast doubt upon living legal doctrine of which the two cases are vital parts. It would unsettle congressional and wider public understandings that racial discrimination is illegal in employment, in private as well as public education and in many large, not necessarily all, social and economic arrangements which take

¹⁰ Cf. Age Discrimination Claim Assistance Act of 1988, P.L. No. 100-263, 102 Stat. 78 (extending statute of limitations in cases held beyond limitations period by E.E.O.C.)

contractual form. Stepping in now to work such a revision in the meaning of a statute, when Congress has not seen fit to do that, would disserve the national purposes for which this Court sits.

III.

THE CONSTRUCTION IN *BUNTON* HAS BEEN STRENGTHENED AND APPROVED BY THE TESTS OF TIME, SOCIAL APPROVAL AND RELIANCE

A. The Inquiry in a *Stare Decisis* Case is Broader and More Policy-Driven Than in a *De Novo* Case of Statutory Interpretation

Stare decisis rests on "practical . . . and policy considerations," *U.S. v. Southwestern Underwriters Ass'n*, 322 U.S. 533, 594 (1944) (Jackson, J. dissenting), underlying the role of the judiciary, and the public perception of it, in the society. Whether or not to overturn a particular decision depends on a careful appraisal of the "practical effects of one [rule] against the other." R. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944).

The presumption against overruling embodied in *stare decisis*, a presumption not overcome by a mere showing that a new rule is sounder in a technical sense than the old, *Illinois Brick Co. v. Illinois*, *supra*, 431 U.S. at 737, requires a court not only to consider a narrow legal issue, but to gauge the impact that the very fact of changing the legal position will have on society. See *Helvering v. Griffiths*, *supra*, 318 U.S. at 400.

Here, the sure foreknowledge of what the relevant impacts will be adds to the weighty reasons for renewed adherence to, not departure from, *Rumson*. The proponents, if any, of abandoning *Rumson* cannot meet "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective" *Vasquez v. Hillery*, *supra*, 106 S.Ct. at 625. On the contrary, the *Rumson* rule furthers the "social interest served by equity and fairness or other elements of social welfare." B. Cardozo, *The Nature of the Judicial Process*, 113 (1921).

B. The *Rumson* Rule Captures the National Consensus Against Racial Discrimination

If governmental discrimination was and is peculiarly obnoxious, it remains true that no minority group can be, and perceive

itself as being, fully part of the community when it is subject to invidious discrimination in the sector still fairly called "private." The ability to compete effectively in that sector—in employment, in housing, in access to public accommodations, in admission to non-public schools and the like—is a critical necessity.

Rumson, its progenitors and progeny, are not legal anomalies extending the rule of non-discrimination where democratically elected legislatures fear to tread. Rather, as Senator Javits said in 1972, "the laws of 1866, 1871 as well as 1964, are to implement [the] promise . . . we make under the Constitution to prevent discrimination," 118 Cong. Rec. 3961 (1972).

These and still other legislative responses to the problem of private racial bias are not the product of a determined minority or highly skilled lobbyists, but a reflection of a broad and deep-seated public consensus. H. Schulman, C. Stech, and L. Bobo, *Racial Attitudes in America* (1985). It is indicative of that consensus that there have been no serious efforts to overturn *Rumson* legislatively, that the decision is not the subject of great controversy in the legal or popular literature, *cf. Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988), and that no party in this very case sought to have *Rumson* reconsidered.

This Court uses particular "cases" or "controversies" to decide "important questions of federal law," Sup. Ct. R. 17, for the benefit of the Nation as a whole. And for the Nation as a whole, questions of technical doctrine, or the correctness of the Court's historical judgments, are not at center stage. A *sua sponte* decision to overturn a prior decision outlawing racial discrimination would be seen by many as a signal that racial discrimination is once again tolerable, that such discrimination is socially and morally acceptable, that the Supreme Court, which for so many years was the bellwether institution in American life on civil rights, is signaling a shift in national attitudes on this paramount problem. Even if Congress were to overturn such a decision, irreparable damage would be done, for the Court would have used its unique role as a teacher of national values to suggest the acceptability of racial discrimination.

It is the very fact of change that would be of the greatest significance as far as the public is concerned. This is a time, then, for

reaffirming principles of *stare decisis* recalled by the Court not long ago in *Vasquez v. Hillery*, *supra*, 106 S.Ct. at 625:

[*Stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

The negative impact of a reversal of *Rumson* would be felt particularly by minorities and members of other groups protected by civil rights statutes. Affected ineluctably would be their feelings about themselves, their neighbors, their place in the society, and their confidence in the institutions of government, particularly the courts. There is no judicial philosophy and no valid perception of this Court's role that can give these prospective consequences less than compelling weight in considering the question of overturning at this time such precedents as *Jones* and *Rumson*.

IV.

NONE OF THE REASONS THAT MAY JUSTIFY A DEPARTURE FROM PRECEDENT IS PRESENT HERE

Judge Cardozo described circumstances that warrant departures from *stare decisis*:

If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.

The Nature of the Judicial Process, *supra*, at 151-52. *Stare decisis* does not require the Court blindly to "perpetuate the injustice," *Jones v. U.S.*, 366 U.S. 213, 221 (1967) of an earlier decision. Stability and predictability are valuable principles, but they are not the only, nor necessarily the most important, values for the legal system.

There is nothing of that sort to weigh in this case against *stare decisis*. Respect for "the *mores* of [our] day" counsels an entirely opposite judgment.

The national needs that underlay *Rumson* are as pressing today for its reaffirmation. Although racial discrimination is now generally regarded as unacceptable, the unfortunate fact remains that, like the grand jury discrimination considered in *Vasquez v. Hillery*, *supra*, it has not become unacceptable in practice. Statutory protections for racial minorities are not mere surplusage, relics of a battle long ago won, which unnecessarily clutter the United States Code. The construction of §1981 to cover private conduct is as essential now as it was in 1976 when *Rumson* was decided.

The present utility of the prior rule is only half the *stare decisis* equation; the other half is whether the proposed new rule of decision—in this case, one permitting racial discrimination in private contracts—would "represent what should be according to the established and settled judgment of society."¹² Again, there is no need to speculate on what that judgment, is for "few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination." *Bob Jones University v. United States*, *supra*, 461 U.S. at 595.

In *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (footnote omitted) this Court noted the disfavored status of racial discrimination: "although the Constitution does not proscribe private bias, it places no value on discrimination." The array of anti-discrimination statutes passed by Congress and the States, the numerous public and private corporate affirmative action plans aimed at increasing the ability of minority-owned businesses to enter into contractual relationships previously denied to them, give eloquent testimony to the need and resolve to continue the legal assault against racial discrimination. So do the public opinion polls collected and described in H. Schuman, C. Stech and L. Bobo, *Racial Attitudes In America*, *supra*. And there are no legiti-

¹² *Dwyer v. Commercial Co.*, 89 Conn. 74, 99 (1915), quoted in B. Cardozo, *The Nature of the Judicial Process*, *supra*, at 151.

mate countervailing goals or pressures that would be served by overruling.

A. No Changed Economic or Social Circumstances Warrant Departure from the Rule of *Stare Decisis*

The "assault on the citadel of privity", *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) and the overturning of the ill-conceived separate-but-equal rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Brown v. Board of Education*, 347 U.S. 483 (1954) are among the best known instances of abandoning a long-settled rule of law in light of changed economic or social circumstances. Neither case, of course, involved statutory interpretation.

In both *MacPherson* and *Brown* there were fundamental changes in society that the Court pointed to as a justification for overturning earlier decisions. In the case of *MacPherson*, the relevant change was from a market composed of artisans dealing directly with customers to a mass market in which producers of goods were several steps removed from the ultimate consumer.

Brown reflected, among many forces, domestic social changes after which it could no longer be pretended that enforced separation of races comported with equality. Emphasizing the latter point in regard to education, the Court said, 347 U.S. at 492, "we must consider public education in light of its full development and its present place in American life . . ." and not the more limited role it played at the time the 14th Amendment was adopted or *Plessy* was decided.

There is no comparable change of circumstances to support overruling in this case. Contracts are still an indispensable part of doing business, and doing business is still a crucial aspect of life in the United States. Private racial discrimination is as offensive as it ever was.

B. The *Ruyon* Decision Places No Unusual Burden on the Judicial System

Amici have discovered no case overturning prior statutory decisions because of changed economic or social conditions alone. There have, of course, been some cases involving departure from *stare decisis* because of changed legal circumstances. In

these cases departing from precedent, not adhering to it, brings unity and cohesiveness to the law, the very goals *stare decisis* is intended to further. No such special circumstances are present here.

In *Puerto Rico v. Brumad*, 107 S.Ct. 2802 (1987), this Court overruled the holding of *Kentucky v. Dennison*, 24 How. 66 (1861), that the federal courts could not order state officials to comply with the mandatory provisions of the Extradition Clause, Art. IV, §2. *Dennison* reasoned that a federal order to a state official would violate the sovereignty of the states. That conception of the relation of the states to the federal government no longer prevailed, at least after *Ex parte Young*, 209 U.S. 123 (1908).

In *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), the Court overruled its earlier decision in *Sinclair Refinery Co. v. Atkinson*, 370 U.S. 195 (1962), that federal courts could not issue injunctions to enforce contractual no-strike provisions. Developments subsequent to *Sinclair Refinery*—the holdings that federal common law governed collective bargaining agreements and that cases involving interpretations of collective bargaining agreements could be removed from state to federal courts—left no-strike clauses wholly unenforceable. Since that combination of legal rules was at odds with federal labor policy favoring no-strike agreements, *Sinclair Refining* was overruled.

Likewise, in *Monell v. Department of Social Services of New York City*, the Court overruled that portion of *Monroe v. Pape*, *supra*, which had held that a city was not a "person" for purposes of §1983 liability. It noted that the *Monroe* holding was inconsistent both with earlier decisions and with subsequent ones involving other governmental bodies, notably school boards. The rule allowing a school board to be sued was inconsistent with the *Monroe* rule and one or the other had to yield. Since the *Monroe* rule could not be justified on the basis of reliance—no municipality could expect to violate federal law with impunity—it had to yield, *Monell v. City of New York*, *supra*, 436 U.S. at 699-701.

Here there are no legal policies at odds with each other. True, in those cases in which Title VII and §1981 overlap, plaintiffs have an opportunity to elect remedies. But the existence of these op-

tions does not reflect conflicting legal policies which if enforced would be at war with each other or with some important federal policy. On the contrary, they represent a conscious policy choice to afford a variety of weapons with which to attack private racial discrimination.

Sometimes social and legal changes converge to require reconsideration of an earlier precedent. *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), overturning *Swin v. Alabama*, 380 U.S. 202 (1964), illustrates this point. In *Swin*, the Court refused to consider a claim that, in a particular case, the prosecutor had used peremptory challenges in a racially discriminatory manner. It did so because it thought it impossible to prove in a particular case that such challenges were racially motivated.

Although the Court in *Swin* was careful to note its disapproval of the racially discriminatory use of peremptory challenges, its decision was nevertheless taken by some prosecutors to signal approval of such actions. In succeeding years, the discriminatory use of peremptory challenges not only did not decline, 106 S.Ct. at 1725 (White, J., concurring) but, possibly as a result of *Swin*, may have become still more common. See 106 S.Ct. at 1726-27 (Marshall, J., concurring).

Moreover, as the *Batson* majority demonstrated, the Court since *Swin* had held that a defendant could in fact prove purposeful discrimination in the selection of a particular jury panel from "the totality of the relevant facts" 106 S.Ct. at 1721, thus undercutting the theoretical grounds of *Swin*.

The combined impact of these social, factual and legal changes left *Swin* an obstacle to "the court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." Hence it was overruled. *Ramsey*, by contrast, is part of "the court's unceasing efforts to eradicate racial discrimination;" it is as essential as ever to those efforts.

C. The Ramsey Rule Has Not Proven Unworkable

A rule of law which in the abstract is thought to be sound may prove unworkable in practice. Sure decisis is no barrier to the

discarding of such a rule. Such was the case of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, *supra*, overruling *Enlow v. N.Y. Life Ins. Co.*, 293 U.S. 379 (1935), and *Enlow v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

Enlow and *Enlow* held that whether stays of certain actions were immediately appealable depended on whether the underlying action was one at law or in equity. Given the merger of the law and equity sides of the District Court, and the difficulty of determining retrospectively and hypothetically whether modern causes of action would have been considered equitable or legal at the time that those terms had substantial significance, the *Enlow-Enlow* doctrine "lent all meanings to the actual practice of the federal courts," was "deficient in utility and sense," "unsound in theory, unworkable and arbitrary in practice," and "unnecessary to achieve any legitimate goals." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 106 S.Ct. at 1140. Understandably, with so little to recommend it, the *Enlow-Enlow* doctrine was abandoned.

As is the case with every prohibitory statute, there is always the question of how far a statute should sweep.¹² The *Jones-Ramsey* reading of §§1981 and 1982 raises fewer problems in this regard than do decisions under Title VII, the Sherman Anti-Trust Act, the Clean Air Act, or hundreds of other statutes.

The familiar problem of setting limits, to be dealt with case by case, is no ground for overruling a precedent that gives rise to the problem. There are, in a word, no reasons of substance for discarding the settled interpretations of §§1981 and 1982 so long accepted by the Congress and the affected citizenry.

¹²It is also quite possible that in some future case the Court will be called upon to determine the reach of §1981 in light of constitutional claims of association or religion. That situation, not present in the instant case, would not in any event suggest the unworkability of §1981.

CONCLUSION

For the reasons stated, the interpretation of §1981 announced in *Ramton v. McCray* should not be reconsidered.

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APPENDIX

APPENDIX A INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to preserve the civil, religious, political and economic rights of American Jews and all Americans. It participated in many of the leading civil rights cases of the last four decades, including both *Jones v. Alfred H. Mayer* and *Rumyon v. McCrury*.

Affiliated Leadership League of and for the Blind of America is a coalition of national and state groups interested in blindness and programs for the blind and severely visually impaired. Also, it seeks to protect the civil rights of the disabled.

The Alliance for Justice is a national association of public interest legal organizations working for equal justice. It is particularly concerned with the rights of minorities and women and works toward removing the vestiges of discrimination against these groups. A number of the Alliance's member organizations representing these groups have relied on *Rumyon* as precedent for further delineating the rights of minorities.

Alpha Kappa Alpha Sorority Inc. is a national Greek-lettered organization which is comprised of over 100,000 members in more than 725 undergraduate and graduate chapters. In 1908, the Sorority became the country's first Greek lettered organization which was established by and for Black women. Long active in the civil rights and affirmative action movement, the Sorority is concerned with this court's decision to revisit the issues decided in *Rumyon v. McCrury* and urges that the interpretation of 42 U.S.C. §1981 announced therein should be reaffirmed.

The American-Arab Anti-Discrimination Committee (ADC), founded in 1980 to defend the civil rights of people of Arab descent and to promote their rich ethnic heritage, is a grass-roots advocacy organization based in Washington, D.C. The ADC works toward protecting the civil rights of all people and assuring equal treatment under the law regardless of race, religion, national origin, sex or any other basis of invidious discrimination.

The American Association for Affirmative Action is a national association of individuals and organizations from the public and private sectors who are dedicated to the development and

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enhancement of equal employment opportunity, affirmative action programs and to professional growth in the field.

American Association of University Women (AAUW), a national organization of over 150,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. AAUW supports legal protection for the rights of all individuals and opposes all forms of discrimination.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and advancing the fundamental civil rights and civil liberties of the people of the United States. In particular, the ACLU has long been involved in the effort to eliminate racial discrimination from our society. In pursuit of that goal, the ACLU has participated in numerous discrimination cases before this Court, and filed an earlier *amicus* brief in this case.

The American Council of the Blind is a national membership organization of the blind and visually handicapped consisting of chapters in almost every state. It has approximately 35,000 members and is dedicated to improving the well being of blind people in all aspects of society.

The American Ethical Union of the Ethical Culture Societies. Ethical culture is a humanistic religious and educational movement inspired by the idea that the supreme aim of human life is working to create a more humane society.

The American Federation of Government Employees, AFL-CIO, (AFGE), is a labor organization which represents approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of nonpostal federal employees and represents employees in nearly every major department and agency of the federal government including the Department of Defense Schools. AFGE is deeply committed to the eradication of any form of discrimination.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 90 national and international unions having a total membership of approximately

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13 million working men and women of all races, colors, religions and national origins.

The American Federation of State, County & Municipal Employees (AFSCME) represents more than 1.4 million public employees throughout the United States. Its membership includes employees of state, county, municipal governments, school districts, public hospitals, and nonprofit agencies who work in a cross section of jobs ranging from blue collar to clerical, professionals and para-professionals.

The American Federation of Teachers, AFL-CIO (AFT) is a labor organization of 680,000 teachers, school related personnel, nurses and health professionals, and state employees, with a long tradition of commitment to civil rights.

The American Jewish Committee is a national organization of approximately 50,000 members founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It believes that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and the rights of all Americans, irrespective of race, creed or national origin, including the broad availability of remedies for invidious discrimination. It, too, was *amicus curiae* in *Rumson and Jones*.

The American Nurses Association, (ANA), is a professional association representing 53 constituent state and territorial nurses associations and their almost 200,000 members. As such the ANA is the largest professional representative of registered nurses in the United States and is concerned with the economic, social, and general welfare of both nurses and the society.

Americans for Democratic Action, Inc. (ADA), a liberal, independent, political action, membership organization. ADA is committed to achieving economic and social justice and the promotion of civil, human and constitutional rights for all.

Americans for Indian Opportunities is a nonprofit organization working toward economic self-sufficiency for American Indians and political self-government for tribal members.

The American Veterans Committee, Inc. (AVC), founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World

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War II, Korean War, or Vietnam War. AVC has filed *amicus* briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, sex, or national origin is detrimental to the national welfare.

The Anti-Defamation League of B'nai B'rith is an organization of American Jews formed in 1903 to combat all forms of bigotry. Throughout its history, it has sought "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens" as demonstrated by its briefs in *Rumson* and *Jones*.

The Asian American Legal Defense and Education Fund is a nonprofit corporation established in 1974 under the laws of the states of California and New York. It was formed to protect the civil rights of Asian Americans throughout the Nation through the prosecution of lawsuits and the dissemination of public information.

The Association for Retarded Citizens of the United States, (ARC) marking its 39th year of nationwide service to people with mental retardation, is made up of over 160,000 members in some 1,300 local and state ARC chapters across the country. One of ARC's goals is to ensure that persons with mental retardation are entitled to and exercise their full range of human and civil rights.

ASPIRA is a national nonprofit association providing educational and leadership services and advocacy on behalf of Hispanic youth.

The Black Women's Agenda, Inc., (BWA), founded in 1979, is a private, nonprofit, voluntary organization of distinguished black women invited to serve. BWA is committed to public policy changes to secure human and civil rights for black women and their families.

B'nai B'rith Women, Inc., (BBW) is a Jewish women's service and advocacy organization.

Business and Professional People in the Public Interest, (BPI), is a nonprofit law center active in civil rights and other public interest cases. BPI members are dedicated to securing fair treatment and effective remedies for all persons.

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Catholics For A Free Choice (CFFC) is a national educational organization that supports the right to legal reproductive health care, especially to family planning and abortion. As an organization of Catholics, it is committed to social justice and to a public policy of non-discrimination toward all persons.

The Center for Community Change (CCC) is a nonprofit organization which provides technical assistance to low income and minority community organizations around the country.

The Center for Law and Social Policy (CLASP), founded in 1969, is one of the oldest public interest law firms in the country. It has developed new areas of the law and has served as a model for similar firms.

The Children's Defense Fund (CDF) represents the interests of low income and minority children and families in the areas of education, child welfare, health, child development, and issues related to adolescent pregnancy. CDF is a national advocacy organization based in Washington, D.C., with state offices in Mississippi, Texas, Ohio, and Minnesota. The organization uses a combination of advocacy strategies including lobbying and administrative advocacy, technical assistance to federal and state officials, to child advocates and, where appropriate, litigation.

The Church of the Brethren (COTB), a Christian body begun in 1708, with a current membership of 160,000, has a deep commitment to justice, including civil rights. The COTB would view with great concern any sign of regression in settled law related to racial discrimination.

Citizen Action is a national federation of 24 statewide citizen groups with 1.75 million members interested in social and economic justice issues that affect people's lives.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of labor unions. CLUW, with 72 active chapters throughout the United States and members from more than 65 International Unions, is dedicated to removing all forms of discrimination in the workplace.

Common Cause is a non-profit, non-partisan citizens' organization with more than 280,000 members, which has been

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dedicated to furthering responsible and accountable government and enhancing and protecting individual civil rights.

The Communications Workers of America (CWA) is a national labor union representing over 750,000 members.

The Community Relations Conference of Southern California is a coalition of ninety community, governmental, religious and labor organizations that promotes civil rights, intergroup relations, and equality in education, work and society for all peoples. CRCSC is committed to the elimination of racism and bias in all forms.

The Congress of National Black Churches, (CNBC), is a coalition of seven major black denominations throughout the United States. CNBC focuses its efforts on matters relating to economic development, health, employment, and human development.

The Department of Church in Society, Division of Homeland Ministries, Christian Church, (Disciples of Christ), is a program unit of the Christian Church (Disciples of Christ) that is assigned responsibilities for matters pertaining to racial justice in the United States.

Disability Rights and Education Defense Fund (DREDF) is a national disability civil rights organization, founded in 1979, dedicated to securing equal citizenship for disabled Americans. From its inception, DREDF's primary purpose has been to include disability within the civil rights arena by demonstrating the connection between disability-based discrimination and discrimination based on race and gender.

The Federation of Organizations for Professional Women is a nonprofit organization of 45 affiliated women's organizations and several hundred individual associate members joined together to achieve the mutual goal of equality in the professions.

The General Board of Church and Society of the United Methodist Church is a program board of the 9.5-million-member United Methodist Church. Its mandate is to "challenge the members of the United Methodist Church to work through their own local church, through ecumenical channels, and through society . . . to analyze the issues which confront the person, the local community, the nation, and the world, and to encourage

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Christian lines of action which assist humankind to move toward a world where peace and justice are achieved."

The Human Rights Campaign Fund, (HRCF), is the largest political action committee representing the interests of the gay and lesbian community on the national level, and the ninth largest independent PAC in the United States. HRCF is dedicated to equal rights for all and works diligently to preserve civil rights.

The Indian Law Resource Center is a non-profit legal and educational organization promoting the rights of Native Americans in the United States and throughout the Americas. The Center is dedicated to ending racial discrimination and to guaranteeing equality and opportunity for Indians under the law.

The International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, (IUE) has approximately 200,000 members throughout the Nation who are employed in the electrical equipment and related industries. Of this total membership, substantial numbers are minorities and/or women. The IUE, by its constitution, contracts, actions and lawsuits, has been in the forefront of the Nation's struggle to establish equal opportunity in employment for minorities and women.

International Union, United Automobile Aerospace & Agricultural Implement Workers of America (UAW), with about one million members and 500 retired members, has been one of the labor movement's leaders in protecting civil rights and in prosecuting civil rights cases during its 50 year history.

The Japanese American Citizens League (JACL) is a non-profit, educational, human and civil rights organization. As a national organization, JACL has 115 chapters throughout the United States, incorporating 25,000 members.

The Jewish Labor Committee (JLC) is a nonsectarian Jewish defense agency which serves as a link between the Jewish community and the trade union movement bringing to each the concerns of the other.

The Leadership Conference on Civil-Rights is a voluntary, nonpartisan association of approximately 180 autonomous national organizations representing minorities, women, disabled persons, labor, and major religious groups and older Americans.

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The Conference has served for 38 years as the coordinating mechanism on behalf of legislative and executive branch advocacy for the civil rights coalition.

The League of Rural Voters Education Project, (LRVEP), is dedicated to increasing the effective participation of rural voters in the political process. Since 1983, LRVEP has provided educational media tools, a national strategy, and various educational publications to help rural people change the political roots of the current farm crisis.

The League of United Latin-American Citizens (LULAC) is the oldest and largest Hispanic organization in the United States. Since 1929, LULAC has worked to assure Hispanic citizens a good education, a better job and the civil rights promised to every American.

The League of Women Voters of the United States (LWVUS) is a non-partisan, nonprofit membership organization with 105,000 members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The LWVUS believes that government and private institutions share responsibility to provide equal opportunity in education, housing and employment.

The Mental Health Law Project (MHLF) is a nonprofit public-interest organization established in 1972 to protect and expand the legal rights of mentally ill and mentally retarded children and adults. MHLF has represented thousands of mentally disabled people in individual cases and class actions establishing fundamental rights.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure through litigation and education the civil rights of Hispanics living in the United States. Because of the continued discrimination suffered by Hispanics in the private sector—particularly in employment, education, and housing—Hispanics continue to place extensive reliance on the Civil Rights Act of 1866 to vindicate their civil rights.

The Mexican American Women's National Association (MANA) is the Nation's largest membership organization for

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Hispanic women. MANA was founded to promote the social, educational, and economic advancement of Hispanic women.

The Migrant Legal Action Program, Inc. is a national legal services support center which provides legal representation to migrant and seasonal farm workers nationwide.

The Minority Business Enterprise Legal Defense and Education Fund, Inc., ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to obtain full enforcement of minority business opportunity programs designed to overcome the effects of racial discrimination in public procurement. Section 1981 has been an indispensable tool for enforcement of private sector compliance with such programs (i.e., remedying the effects of racial exclusion of minority subcontractors by prime contractors). MBELDEF therefore has a significant interest in the Court's reconsideration of its longstanding interpretation of 42 U.S.C. §1981.

The Minnesota Lawyers International Human Rights Committee is a non-profit organization committed to promoting human rights and to investigating human rights violations in the United States and abroad. The Committee was formed in 1983 by a group of lawyers who share a strong interest in working to end human rights violations. The Committee has grown to include over 600 lawyers.

The National Abortion Rights Action League (NARAL) is the political arm of the pro-choice movement, working since 1969 to preserve and expand reproductive freedom through a national membership of more than 100,000 and 34 state-based affiliates. NARAL fears that if *Rumson v. McCrary* is no longer settled law then other established civil rights and liberties may similarly be at risk.

The National Alliance of Postal and Federal Employees is the oldest and largest black-led independent labor union in the nation with 127 locals in 37 states, the District of Columbia and the Virgin Islands.

The National Association for the Advancement of Colored People (NAACP) was established to promote equal justice for all

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Americans; to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.

The National Association for Equal Opportunity in Higher Education (NAFEO) founded in 1969, is the membership organization of 117 public and private historically and predominately black colleges and universities.

The National Association of Human Rights Workers' purpose is to encourage the collection, compilation and dissemination of information and research to facilitate the exchange of knowledge among governmental and private organizations dealing with racial, ethnic and cultural relations in the improvement of inter-group relations.

The National Association of Social Workers (NASW), a non-profit professional association with over 115,000 members, is the largest association of social workers in the United States. The association has an abiding commitment to combating discrimination and its effects.

The National Bar Association, Inc., founded in 1925, is a professional membership organization which represents more than 12,000 Black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens.

The National Black Caucus of State Legislators is an organization composed of 411 legislators from 42 states and the United States Virgin Islands. The organization was founded to represent the interests of black legislators and their 26 million black constituents around the United States.

The National Black Leadership Roundtable is a national organization comprised of the heads of over 300 national black organizations.

The National Catholic Conference for Interracial Justice was established to implement the teachings of the Catholic Church on

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cultural and racial justice and to promote the Church's vision of multi-cultural, multi-racial understanding, mutual respect and collaboration consistent with the values and principles of democracy and the Constitution of the United States.

The National Caucus and Center on Black Aged is a membership based organization of 30,000 that provides advocacy services to the low income and minority elderly throughout the United States.

The National Community Action Agency Executive Directors' Association, (NCAAEDA), represents a network of 980 community action agencies around the country who are fighting poverty. NCAAEDA is a professional organization providing training and technical services that support community action.

The National Congress for Puerto Rican Rights is a national Puerto Rican civil rights organization founded in 1981. Its basic mission is to seek the political empowerment and defend the civil rights of all Puerto Ricans and Latinos in the United States.

The National Council of Churches of Christ in the U.S.A. (NCC) is a "community of communions" composed of thirty-two national religious bodies in the United States having an aggregate membership of over 44,000,000. The NCC has been committed throughout its history to the attainment and protection of the civil rights and liberties of all citizens.

The National Council of Jewish Women (NCJW), was founded in 1893. It is an organization comprised of 200 sections across the country with over 100,000 members who are active in advocacy and community service. NCJW is the oldest major Jewish women's organization in the United States. Its members are volunteers dedicated in the spirit of Judaism to the advancement of human welfare and the democratic way of life.

The National Council of La Raza exists to improve opportunities for the more than 20 million Americans of Hispanic descent. Incorporated in 1968, the Council serves as an advocate for Hispanic Americans and as a national umbrella organization for its local "affiliates"—Hispanic community-based groups which serve 32 states, Puerto Rico, and the District of Columbia—and for other local Hispanic organizations nationwide. The Council's

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network includes more than 3,000 Hispanic organizations and individuals nationwide.

The National Council on the Aging, Inc. is a national non-profit association of organizations and professionals serving the needs of older citizens. It engages in research, demonstration programs, professional standards setting and advocacy.

The National Council of Senior Citizens, Inc., is a public interest advocacy organization established to represent the interests of older people before local, state and federal governments.

The National Education Association (NEA) is the largest public employee organization in the United States, with approximately 1.9 million members, virtually all of whom are employed by public educational institutions. One of NEA's principal purposes is to safeguard the civil rights of its members in matters pertaining to their employment. To this end NEA has funded litigation on behalf of its members alleging violations of 42 U.S.C. §1981. In addition, NEA has a major interest in the elimination of racial and ethnic discrimination. NEA filed an *amicus* brief in *Rumson v. McCrory*.

The National Federation of Business and Professional Women's Clubs, Inc. (BPW/USA) is the world's oldest and largest organization of working women. With 125,000 members in 3,400 local organizations across the country BPW/USA promotes full participation, equity, and economic self-sufficiency for working women. BPW/USA includes among its members men and women of every age, religion, race, political party and socioeconomic background.

The National Federation of Temple Sisterhoods, representing the women of Reform Judaism with more than 100,000 members in 600 local sisterhoods throughout the United States, is dedicated to religious and educational programs and projects that translate the prophetic teachings of Judaism into our lives, synagogues and communities. An organization of religious women it is committed to the pursuit of justice and freedom.

The National Gay and Lesbian Task Force (NGLTF), with 13,000 members nationwide, lobbies, advocates and educates to achieve full civil rights for lesbians and gay men. NGLTF is

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deeply committed to ending discrimination on the basis of race, sex, ethnicity, physical ability, religion and sexual orientation.

The National Jewish Community Relations Advisory Council is an umbrella organization consisting of 13 national member agencies and the 114 Community Relations Councils representing all Jewish major communities in the United States. These Jewish community relations agencies have held a longstanding and deep commitment to promoting social and economic justice for all people. The history and experience of anti-Jewish persecution and discrimination underscores its efforts to ensure that all minorities are afforded protections against discrimination and oppression.

The National Legal Aid and Defenders Association (NLADA) is a private charitable association started some 77 years ago by prominent members of the legal profession. The purpose of the organization is to contribute to the accessibility, quality and effectiveness of legal representation of those indigent persons in the United States who cannot pay for representation. The clients of the civil organizations are poor, and often members of minority groups who have historically depended on the post Civil War Civil Rights Acts to pursue legal remedies otherwise unavailable to them.

The National Low Income Housing Coalition is a membership organization of housing groups and individual activists across the country. Its basic principle is that housing is a basic principle human right and all people are entitled to decent, safe, sanitary and acceptable housing.

National Neighbors is a national federation of 260 multiracial neighborhood groups in 27 states and the District of Columbia working to promote fair housing and successful multiracial neighborhoods.

The National Organization for Women (NOW) is a membership organization with more than 700 chapters in all 50 states. NOW's purpose is to take action to bring women into full and equal participation in American society. One of NOW's top priorities is combating racism and the double burden faced by women of color.

Interest of the Amici

The National Puerto Rican Forum is a 32 year old national Puerto Rican and Hispanic organization involved in providing direct services in the area of employment and education.

The National Urban League, Inc., (NUL) is a non-profit community-based agency which works to secure equal opportunity for blacks and other minorities in every sector of American society. The vigor of the NUL is manifested through its 112 affiliates in 34 states and the District of Columbia.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and to the elimination of discrimination from all facets of American life.

The National Women's Political Caucus is dedicated primarily to the election and appointment of qualified women to political office. Representing thousands of members of all ages, lifestyles and economic and ethnic backgrounds, the Caucus is committed to working for women's rights, civil rights and legislation supporting women and families.

The NOW Legal Defense and Education Fund (NOW LDEF) was founded in 1970 by leaders of the National Organization for Women as a nonprofit civil rights organization to perform a broad range of legal and educational services nationally in support of women's effort to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting discrimination against women and minorities by both public and private entities.

Opportunities Industrialization Centers of America, Inc. is a private non-profit organization, which promotes full employment and is especially organized for the purpose of finding, motivating, training, counseling and placing on jobs the unemployed and underemployed but primarily persons who are poor, with little or no skills, young or old.

The Organization of Chinese Americans, Inc., (OCA) with 7,500 members in 41 chapters nationwide is committed to encour-

Interest of the Amici

aging the active leadership of all Chinese Americans in all levels of civic affairs. The OCA promotes civil rights for all individuals regardless of race or ethnic background.

The Organization of Pan Asian American Women (Pan Asia) was founded in 1976. It is a national, non-profit membership organization composed of Filipino, Chinese, East Indian, Japanese, Korean, Vietnamese, Pacific Islander, and other American women of Asian descent. Pan Asia seeks to ensure the full participation of Asian-Pacific American women in all aspects of American society, particularly in those areas where they have traditionally been excluded or under represented. It is particularly concerned about the negative impact reversal of *Rumyon* would have on equality of educational opportunities for racial minorities.

The Phi Beta Sigma Fraternity, Inc., with the force, vigor, power and energy of more than 85,000 dedicated men in more than 600 chapters across the United States, Africa, Europe, Korea and the Caribbean, continues faithfully to perpetuate composite growth and progress as the "People's Fraternity" dedicated to providing services to all humanity. The officers and members of Phi Beta Sigma support equality regardless of race, color, creed, national origin, or sex.

Planned Parenthood Federation of America, Inc. (PPFA) is the nation's oldest and largest voluntary family planning organization with 182 affiliates in 44 states and the District of Columbia operating approximately 800 clinics. PPFA supports the principles of equality articulated in *Rumyon* and believes that racial bias or discrimination in any form is intolerable.

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and education leaders devoted to the Nation's heritage of tolerance and pluralism, People for the American Way now has 270,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition.

Interest of the Amici

Project Equality, Inc. is a national non-profit organization established by the religious community to support equal employment opportunities for minorities and women.

The Progressive National Baptist Convention was founded twenty-seven years ago to promote and work for certain goals, including the realization of racial, social and economic injustice. Today, the PNBC numbers 1.8 million members in primarily Black American Baptist churches nationwide.

The Puerto Rican Legal Defense and Education Fund, Inc. is a national civil rights organization established in 1972. Its principal objective is to secure, through litigation and education, the civil rights of Puerto Ricans and other Latinos living in the United States. Because of the continued discrimination suffered by Puerto Ricans and other Latinos in the private sector, particularly in employment, education, and housing, Puerto Ricans and other Latinos continue to place extensive reliance on the Civil Rights Act of 1866 to vindicate their civil rights.

The A. Philip Randolph Institute is a national organization of black trade unionists representing some 40 unions with 200 chapters in 37 states. Since its inception in 1965, it has served as a bridge between the labor movement and the black community.

The Southern Christian Leadership Conference, (SCLC), founded in 1957, is a voluntary civil rights organization comprised of 18 chapters throughout the United States. SCLC is dedicated to improving the quality of life of African American people.

The Southern Poverty Law Center is a nonprofit organization whose purpose is to advance the legal rights of the poor through litigation and education. It provides class action litigation in areas of civil rights and representation of those injured or threatened by activities of the Klu Klux Klan and related groups.

The Synagogue Council of America is an umbrella organization representing Orthodox, Conservative and Reform Jewish Rabbinical and Congregational bodies in the United States. It has long supported strong measures to ensure the civil rights of all Americans.

The Union of American Hebrew Congregations (UAHC) represents 800 Reform congregations and 1.2 million Reform

Interest of the Amici

Jews across the U.S. Throughout its history, the UAHC has steadfastly supported efforts to provide civil rights and equality for all Americans.

The United Church of Christ, Office for Church and Society, is the agency of the UCC assigned the social action mission of the 1.7 million member church. The Office for Church and Society has the responsibility of addressing questions of civil and equal rights and social issues that empower individuals to have choices.

The United States Student Association (USSA) is a national membership organization representing college and university students in the United States. USSA seeks to expand educational opportunities for all individuals in our nation regardless of race, sex, physical ability, or ability to pay.

The Villers Foundation is a private, nonprofit foundation concerned with assuring that the essential needs of elders, especially those of lower income, are met, and concerned with enabling elders to be active participants in society so they are empowered to act on their own behalf.

The Washington Ethical Action office is the Washington office of the American Ethical Union, a national federation of ethical societies (ethical cultural movement). The ethical cultural movement is a humanistic, religious, and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society.

Women Employed is a national membership association of working women. Over the past fifteen years, the organization has assisted thousands of women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal employment opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

The Women's Equity Action League (WEAL) was founded in 1972 as a national, non-profit membership organization sponsoring research, education, litigation, and advocacy to advance the economic status of women. It is committed to the full and effective enforcement of anti-discrimination laws in order to ensure equality of opportunity for all, regardless of race, sex, nation-

Interest of the Amici

ality, age religion or disability. WEAL has appeared before this court as *amicus curiae* in several cases concerning the rights of women.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

The Workmen's Circle is a Jewish organization that offers benefits and services to its members, supports legislative and other action for social progress in the liberal tradition and is committed to the perpetuation and enrichment of Jewish secular culture.

For 130 years, the YWCA of the U.S.A. has struggled to secure equity and dignity for all people. Thus, it has a strong interest in the outcome of the issue of statutory interpretation that is now before the U.S. Supreme Court. 42 U.S.C. §1981 has been an important tool for redress, one which the YWCA of the U.S.A. believes should remain available to parties seeking justice.

No. 87-107

Supreme Court, U.S.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,
v. *Petitioner,*

MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE
THE WASHINGTON LEGAL FOUNDATION,
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BRIEF OF AMICI CURIAE

THE WASHINGTON LEGAL FOUNDATION,
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 NORMAN D. SHUMWAY, ROBERT S. WALKER,
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 RESEARCH AND EDUCATION, AND THE
 ALLIED EDUCATIONAL FOUNDATION
 IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The interests of amici curiae are described in Appendix A hereto.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in respondent's brief.

SUMMARY OF THE ARGUMENT

The issue presented in this case is fundamentally a question of separation of powers and fidelity to the rule of law. Amici submit that *Runyon v. McCrary*, 427 U.S. 160 (1976) should be reconsidered and overruled or modified because it is a clear misinterpretation of the intent of the Congress that enacted 42 U.S.C. § 1981, and because *stare decisis* concerns are not compelling in this case.

The language of Section 1981, which quite often is ignored in judicial interpretations, clearly shows that the rights guaranteed were of the nature of legal capacities, including the capacity to contract. The legislative history of Section 1981, whether derived from the Thirteenth or Fourteenth Amendments, further demonstrates that intent. Nevertheless, by providing freedmen with these legal capacities, Section 1981 enabled private wrongdoing to be redressed without the tortured reading that petitioner gives to the "right to contract" clause.

Stare decisis, which is rooted in the stability of the law, is not compelling here precisely because *Runyon*

gives Section 1981 an unsettled reading. Finally, Congress has not "affirmatively endorsed" *Runyon* or other decisions interpreting Section 1981. The legislative activity cited by the petitioner is equivocal at best, but in any event, is no substitute for the proper exercise of congressional powers under Article I of the Constitution. This Court should not usurp the role of Congress even if some of its members may be willing to shirk their legislative responsibility to make the hard policy decisions.

ARGUMENT

1. CONGRESS INTENDED THAT SECTION 1981 REMOVE ONLY LEGAL DISABILITIES IMPOSED BY THE STATES AND SUCH A READING OF THE LAW HAS HAD THE EFFECT OF REMEDYING BOTH PUBLIC AND PRIVATE DISCRIMINATION.

A fundamental principle of statutory interpretation is that courts are to examine the words that the legislature chose in framing the law and to give those words their ordinary and plain meaning as they were understood at the time they were used. See *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (statutes must be interpreted "in light of the intent of the Congress that enacted them"). A corollary rule is that the words of the statute are to be read in the context of the entire statute in question. It is only when those words are unclear or their meaning ambiguous, either by themselves or in context with the rest of the statute in question, that a court should look outside the statute to discern what the Congress meant by the language it selected.

Although these rules of statutory construction are basic, amici find it necessary to repeat them because they are disregarded by the petitioner. In her 118-page brief, the petitioner's methodology of discerning congressional intent is, as she puts it, "an essentially pragmatic one." Pet. Brief at 40. That is, faced in 1866 with evidence of wrongdoing by private individuals against the freed-

men, did the 39th Congress intend to outlaw only public discrimination by passing the 1866 Act? Accordingly, petitioner's brief first discusses the existing conditions that the freed slaves faced (Pet. Brief at 14-40), and then it analyzes the congressional debates on the bill (Pet. Brief at 41-71). We are also told what the editorial writers of certain newspapers felt about the legislation. (Pet. Brief at 49). The remainder of the brief deals with the legislative acquiescence of later Congresses and the *stare decisis* doctrine.

Notably absent in all of this is any discussion and analysis of the language of Section 1981 itself. Amici believe it is imperative that any judicial interpretation or re-interpretation of Section 1981 must begin—and indeed may even end—with the language Congress chose. The law as written is what this Court is required to interpret. As Justice Stevens, speaking for the Court in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), stated: "It is our task to give effect to the statute as enacted."¹

Accordingly, amici will first examine the language of Section 1981, and then discuss the congressional debates and the context in which the law was passed, including subsequent litigation, to demonstrate that Congress intended to provide the freedmen with important legal capacities.

A. The Language of Section 1981

Section 1981 states in full:

All persons within the jurisdiction of the United States shall have the same right in every State and

¹ *Id.* at 819. In *Mohasco*, Justice Stevens gave a literal reading to the filing requirements of the Civil Rights Act of 1964 and rejected a *pro se* discrimination complaint as untimely even though the lower court's more equitable interpretation of the Act would be faithful to "the strong federal policy of insuring that employment discrimination is redressed." *Id.* at 813. The Court ruled that the word "filed" used in two separate subsections of the same statute must be given the same meaning.

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The key phrase in question is the "right . . . to make and enforce contracts."² These precise words are crucial to a proper understanding of the statute. Grammatically, the rights declared are cast in infinitive phrases, e.g., "to make and enforce contracts," "to sue, be parties, give evidence." As this statute is discussed and analyzed in various cases, however, the Court and the parties quickly deviate from this original language and begin discussing this phrase as if it were a gerund, i.e., that 1981 prohibits discrimination "in the making and enforcement of private contracts." *Runyon v. McCrary*, 427 U.S. 160, 163 (1976). (Emphasis added.)

The gerund is often converted into a noun when we are told that Section 1981 prohibits "employment discrimination." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 459, 460 (1975). Thus, the language of § 1981 has undergone a judicial metamorphosis such that the "right to make" no longer reflects the right or capacity "to do" something; rather, it has come to mean an ongoing process by the use of a gerund—"no discrimination in the making and enforcement of a contract—as well as "employment," a noun denoting a status or relationship. Amici believe that this deviation from the actual language of Section 1981 has caused some of the difficulties in applying it to cases such as this.³

² More accurately, the phrase under scrutiny is simply the "right . . . to make . . . contracts" since all parties would agree that the "right to enforce" contracts means only the right to enforce the contract in a court. As such, that right cannot be infringed by private persons once a contract has been made.

³ That is why we find petitioner in this case struggling to fit her allegations that she was harassed during the performance of

As Justice White clearly put it in his dissent in *Runyon*:

On its face the statute [which] gives "[a]ll persons" . . . the "same right . . . to make . . . contracts . . . as is enjoyed by white citizens" clearly refers to rights existing apart from this statute. Whites had at the time when § 1981 was first enacted, and have [today]. . . . no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. . . . What is conferred by 42 U.S.C. § 1981 is the right—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court.

427 U.S. 160, 193-94 (emphasis in original).

Slaves were considered chattel or property and thus had no legal rights or capacities whatsoever. Section 1 of the Civil Rights Act of 1866 gave the freed slaves both citizenship and the natural rights that go along with that status. The right of a citizen to "make a contract" means the legal capacity to accept offers or to make them,

her job into the language of the statute. She does this by creating the fiction that her single at-will contract with her employer is really a new contract to be made every day, and that her agreement to work each day with the possibility of being harassed is apparently a condition precedent to her acceptance of a daily contract to work. See Transcript of Oral Argument at 10 (Feb. 29, 1988). This novel theory obviously gave the Court some difficulty and the Court alluded to it as one of the reasons that caused it to rehear this case and reconsider *Runyon*. See *Patterson v. McLean Credit Union*, 108 S.Ct. 1419 (1988). If a single contract at-will can be construed to be multiple contracts made each work day, as petitioner contends, why not construe it as multiple contracts made each hour (since the employee is likely to be paid by the hour), *ad infinitum*? In that way, the transformation of the phrase "to make a contract" into "performance of a contract" is complete.

Amici believe that the language of § 1981 cannot bear such construction and that claims for discrimination under the terms and conditions of employment, including harassment, are more properly covered by Title VII, 42 U.S.C. § 2000e-2 and related state claims, such as tortious interference with contractual rights, or breach of implied duty of good faith in the performance of a contract.

but not the right to compel others to accept offers or make them.⁶

That Justice White was correct in characterizing the "right . . . to contract" as a legal right or capacity to contract is evidenced by examining the other "rights" provided in Section 1981. For example, all persons are given the "right . . . to sue, be parties, give evidence, and to [enjoy] the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons. . . ."

It is evident that the other "rights" provided by Section 1981 involve rights that affect the legal status or capacity of the person. Those rights can only be affected by the state rather than by private individuals.⁷

⁶ Even as a matter of simple contract law, the majority in *Repton* erred. The Court stated that the private schools "advertised and offered" its "educational services" to "members of the general public" through the Yellow Pages and brochures addressed to "resident." 427 U.S. at 166, 172. The Court thus characterized the school as the "offeror" and the public as "offerees." *Id.* at 171. However, it is well-settled under contract law that advertising does not constitute an "offer." See *Restatement (Second) on Contracts*, § 23, 26, Comment b. At best, it is a solicitation for offers from those who read the advertisements. See *Strisberg v. Chicago Medical School*, 49 Ill. 2d 320, 371 N.E. 2d 634, 639 (1977). Indeed, in common parlance, an applicant (offeree) may have his or her application "accepted" by the school (offeror). The private school is not bound to accept all the offers made to it. Even after the school has accepted the offer, the offeror is usually not bound under normal contract rules to the contract, but instead is allowed a certain period of time within which to confirm or reject the contract. In such a case, the school does eventually extend a legal "offer." In any event, the plaintiffs in *Repton* were at least one if not two transaction levels away from being considered an "offeree" as this Court mischaracterized them.

⁷ Of course, if someone has the right to give evidence, that is, to testify in court, theoretically that right can be frustrated if the potential witness is kidnapped by private individuals to prevent the giving of the testimony at a particular proceeding. But those kinds of private wrongs are not addressed in this legislation but in other sections of the civil rights laws. See, e.g., 42 U.S.C. § 1985(3).

Thus, to be internally consistent, the "right . . . to contract" must be interpreted in the same way as the other rights specified in § 1981. After all, if it is a rule of construction that the same word used twice in a statute should be interpreted the same way (see *Mohasco Corp. v. Silver, supra*), a word used only once ("right") should mean the same for all of its subsequent descriptive modifiers. Since those other rights indisputably refer to legal capacities, and the removal of legal disabilities, so too is the right to contract. No one could argue, for example, that since the freedmen have the "right to give evidence" or testify in court that a potential witness in a criminal or civil action could sue the prosecutor or attorneys involved for failing to call them as witnesses, alleging discrimination.⁸

B. The Legislative And Legal History Of Section 1981

Amici submit that because the language of Section 1981 is clear, there is no need to examine the legislative history of the measure. Nevertheless, an examination of that history clearly shows that Congress intended only to remove legal disabilities.⁹

⁸ Thus, if Section 1981 is interpreted to mean that discrimination is prohibited "in the making of a contract" so too must it be prohibited "in the giving of evidence" or in "testifying." Does a prosecutor risk violating Section 1981 or a private defense attorney for interrogating a black witness in a "harrassing" manner? Are jury members liable for a suit under Section 1981 because it is alleged that the jurors gave more credence to the testimony of a white witness or party than a black one, or vice-versa? See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1974) (white persons may invoke § 1981). Could a student of one race sue the school for discrimination under § 1981 because the student claims that he or she is being "disciplined" (harrassed) more than students of a different race in performance of his or her educational contract? These issues will be further discussed below under the section on *stare decisis*.

⁹ *Amici* agree completely with Justice White's analysis in *Repton* of the legislative history of Section 1981 which shows that it is derived not from Section one of the Civil Rights Act of 1866, but from Section 16 of the Voting Rights Act of 1870 which was passed

1. The Schurz Report.

At the outset, amici do not dispute for the most part the historical picture painted by the petitioner of the abuses suffered by many of the former slaves in 1865 after they were freed. The petitioner cites at length the findings in the reports of General Carl Schurz and others which describe the various abuses committed by the former slave owners and others from the time of the slaves' emancipation toward the end of the Civil War until November, 1865. Pet. Brief at 16-40.^{*}

pursuant to the Fourteenth Amendment proscribing only discriminatory state action. 427 U.S. at 192. The petitioner's argument that the Reviser's marginal note in the Revised Statutes of 1874 captioned "equal protection of the laws" appeared after the 1874 law was revised (Pet. Brief at 6), does not diminish the unrefuted and unequivocal statements of Senator Stewart indicating that what is now Section 1981 applied only to state action. *Rwenson*, 427 U.S. at 210.

Nevertheless, amici will demonstrate that even if Section 1981 is derived from both the Voting Rights Act of 1870 and the Civil Rights Act of 1866, or for that matter, from the Civil Rights Act of 1866 alone, the 39th Congress did not intend in 1866 to require unwilling parties to make private contracts. As even Justice Stevens clearly put it in his concurring opinion in *Rwenson*:

There is no doubt in my mind that that construction of the statute [that section 1 of the Civil Rights Act of 1866 prohibits private racial discrimination] would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence.

427 U.S. at 189-90. For an excellent scholarly discussion of the history of the Reconstruction legislation and criticisms of the rationale in *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), see C. Fairman, *Reconstruction and Reunion* 1117-1258 (1971); Casper, *Jones v. Mayer*: *Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. See generally Bolt, *A New Birth of Freedom: The Republican Party and Freedman's Rights, 1861-1866* (1976).

^{*} S. Exec. Doc. No. 2, 39th Cong., 1st Sess.

The fact that the Congress was aware of these problems when it began in January 1866 to consider the Civil Rights Act, however, does not mean that the Congress intended to address all of those problems and their manifestations in one of the very first pieces of legislation that came before them. In addition, other legislation was proposed and some of it enacted into law between 1866 and 1875 which deals specifically with private discriminatory action. Thus, petitioner's "pragmatic approach" of discerning legislative intent is disingenuous, and does not take into account the fact that Congress does not fully address a problem all at once.

But as will be demonstrated below, even many of the problems referred to by the petitioners of private discrimination were able to be corrected by the Civil Rights Act of 1866 because of the right given to the freedmen to sue in courts and give evidence. Thus, although amici maintain that Congress only intended to remove legal disabilities of the freed slaves, that notion is not incompatible with the prospect that private discriminatory actions would also thereby be redressed. In amici's view, the traditional "either/or" question of "whether Section 1981 covers only state action or does it also prohibit private discrimination" is therefore misleading.

The debates of the 1866 legislation during the three months from the time the bill was introduced by Senator Trumbull on January 6, 1866, until the law was passed over President Johnson's veto on April 9, clearly show that the 39th Congress was attempting to remove or prevent the legal disabilities that were or might be placed in the way of the freed slaves.

To put this in perspective, after the 13th Amendment was ratified in December 1865, it was unconstitutional for slavery or involuntary servitude to "exist" except for punishment of a crime. While it was incumbent upon the reconstructed southern states to enact laws to protect

the newly freed slaves, many of these measures were thinly veiled disguises to perpetuate many features of the slave system. These "Black Codes" as they were called, were ostensibly enacted to protect the freed Negroes, but contained pernicious measures such as making vagrancy a crime and thereby subjecting the former slave to involuntary servitude.

The petitioner's brief attempts to downplay the problems that blacks faced by these legal disabilities by stating, for example, that at the time that General Schurz drafted his report in November 1865 detailing the post-war abuses in five southern states, there were only "scattered local ordinances in Louisiana and Mississippi, measures which Schurz acknowledged were as of yet 'mere isolated cases.'" Pet. Brief at 24.

The petitioner seriously mischaracterizes the thrust and import of the Schurz report, however, by attempting to show that private conduct rather than laws or regulations were of primary concern to Schurz (and inferentially, to the Congress). Much of the report, however, focused on these local ordinances and what they forebode to the freed slaves if such laws were used to replace the old slave codes. Thus, rather than diminishing the impact of these regulations, Schurz quoted whole sections of them, some of which he noted "deserves careful perusal."⁹

⁹ Schurz Report at 23. Schurz highlighted the following regulations of a Louisiana town:

Section 3. No negro or freedman shall be permitted to rent or keep a house within the limits of the town under any circumstances, and any one thus offending shall be ejected and compelled to find an employer or leave the town within twenty-four hours. The lesser or furnisher of the house leased or kept as above shall pay a fine of ten dollars for each offence.

Section 4. No negro or freedman shall reside within the limits of the town of Opelousas who is not in the regular service of some white person or former owner.

Id. (emphasis in original).

Schurz was obviously concerned about the effect these laws and regulations had on the status of the freed slaves, and he had a clear sense that these regulations in Mississippi and Louisiana portended a bleak future for the blacks if other jurisdictions were to embark on the same path. It was in this context that Schurz stated:

"It may be said that these are mere isolated cases; and so they are. But they are the local outcroppings of a spirit which I found to prevail everywhere."

Schurz Report at 25.

Thus, rather than finding Schurz dismissing these regulations as "mere isolated cases" as petitioner would have us believe (Pet. Brief at 24), we find Schurz sounding a warning note of state legislative activity to come.¹⁰

Of course, what Schurz was referring to was the soon to be enactment of the infamous Black Codes on a state-wide rather than local basis. Indeed, Schurz's warning was correct, for after his report was finished, not only did South Carolina enact its Black Code, but similar ones were enacted at the end of 1865 by Louisiana, Mississippi, Alabama, and in early 1866 by Virginia, North Carolina, Georgia, and Texas. See Fairman, *Reconstruction and Reunion* 106 (1971).¹¹

¹⁰ Schurz's report continues:

[T]here are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted. I have already noticed some movements in that direction, which . . . [the Louisiana] ordinances were the most significant. Other things of more recent date, such as a new negro code submitted by a committee to the legislature of South Carolina, are before the country. They have all the same tendency [as the municipal regulations of Louisiana], because they spring from the same cause.

Schurz Report at 23 (emphasis in original).

¹¹ Another example of the petitioner's mischaracterization of the Schurz report as emphasizing private wrongs rather than legal disabilities is the petitioner's cite to Schurz's report:

2. Congressional Debates In The 39th Congress.

An examination of the numerous statements made by the proponents of the Civil Rights Act of 1866 clearly demonstrate that Congress did not intend to require private individuals to contract with others, but rather intended to remove legal disabilities and to punish state officials for violating those rights. While the phrase "state action" was not used in those days, the key concern of the Congress after the Civil War was the constitutional limits of the federal government to interfere in state affairs.¹²

There is not a single unambiguous statement in the numerous debates which indicated that Congress intended to legislate beyond the state level and go so far as to regulate private contractual decisions. Such a notion would have sparked great debate.¹³

"[N]o ingenious heads set about to solve the problem, how to make free labor compulsory...."

Petitioner's Brief at 22. What is ingenious is petitioner's convenient use of the ellipsis; the rest of the sentence of that excerpt reads: "by permanent regulations." See Report at 22. The petitioner also ignores another relevant statement by Schure who quotes Colonel Thomas's observations that the private prejudices are "apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another." Schure Report at 21. (emphasis added).

¹² It is ludicrous, therefore, for amici Eric Foner, et al., to argue that the framers "did not recognize the modern 'state action doctrine' as a possible . . . limitation on their power to redress civil rights violations." Brief at 11. While the framers could be easily forgiven for not understanding our "modern state action doctrine," they certainly understood the "old" state action doctrine and legislated in that context. The principal argument during the debates centered around Congress' constitutional power to "enter the domain of a State and interfere with its internal police, statutes, and domestic regulations." (Cong. Globe, 39th Cong., 1st Sess. 1120 (Rep. Rogers)).

¹³ Where Congress legislated against private racial conduct, it clearly did so. *See, e.g.*, the Anti-Kidnapping Act of 1866, the Anti-Pageage Act of 1867 (see 42 U.S.C. § 1994), the Anti-Ku Klux

What one clearly finds in the debates is an attempt to codify the "natural rights" belonging to the freed slaves. Thus, the first section of the 1866 bill declares that "all persons born in the United States . . . are hereby declared to be citizens of the United States. . . ." While this declaration was later constitutionalized in the Fourteenth Amendment, the 1866 Act proceeded to declare what the natural rights were that were associated with citizenship. Those natural rights were described by Congressman James F. Wilson, House floor manager of the Civil Rights Act, and other proponents of the bill as they were described by Blackstone, Chancellor Kent, and other legal philosophers, i.e., the "right of personal security" (legal enjoyment of his life and limb); "right of personal liberty" (described as a power of locomotion or travel); and "right of personal property" (to acquire and dispose of his acquisitions). Cong. Globe, 39th Cong., 1st Sess. 1118.

As Congressman Wilson stated:

It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. . . . If the States would observe the rights of our citizens, there would be no need of this bill. . . . And if above all . . . the State should admit . . . that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might without doing violence to the duty devolved upon us, leave the whole subject to the several States. But . . . the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny.

Id. at 1117-18 (emphasis added).¹⁴

Klan Act of 1871, 42 U.S.C. §§ 1983, 1986, and the Public Accommodations Act of 1875.

¹⁴ Amici do not understand how amici Foner, et al., who cite only the last phrase of this passage "we must do our duty by supplying the protection which the states [sic] deny." Foner Brief at 16, can possibly claim that Wilson's statements support their

As one commentator put it, if the guarantee on the right to make and enforce contracts were viewed as prohibiting private discrimination,

"the Bill would not only have effected a truly revolutionary change in the federal system but would also have been entirely inconsistent with the very natural rights theory which the Republicans sought to implement. . . ."

Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 *Hous. L. Rev.* 221 (1986).¹²

Numerous other statements by the proponents of the bill further demonstrate the state action nature of the measure. Typical is the statement of Senator Trumbull, the bill's sponsor:

[The bill] will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between person on account of race or color shall be abolished.

Cong. Globe, 39th Cong., 1st Sess. 476.¹³

argument that Congress intended to legislate against discrimination by private persons rather than by the state.

¹² The argument that the law was not needed to strike down the Black Codes because the military commanders under the Freedmen's Bureau had begun to enjoin the operation of some of those laws is misleading. See Foner Brief at 8. The Civil Rights Act was seen as legal mechanism to replace that military procedure in a comprehensive manner. As Congressman Thayer noted, the very fact that the military was attempting to deal with the Black Codes "demonstrates the necessity for enforcing the guarantees of liberty and of American citizenship conferred by the Constitution . . . [n]ot by military force . . . but through the quiet, dignified, firm, and constitutional forms of judicial procedure." Cong. Globe at 1152.

¹³ See also *id.* at 474 (Sen. Trumbull); *id.* at 1118 (Rep. Wilson); *id.* at 1291 (Rep. Bingham); *id.* at 1293-1294 (Rep. Shellabarger).

Even after President Johnson's veto of the bill (which referred to the law as providing a "capacity to make a contract," Cong. Globe 1690) Senator Trumbull insisted in unambiguous language that:

This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.

Id. at 1761.

Petitioners are unable to refute or counter this clear and overwhelming evidence of legislative intent by the sponsor and supporter of the bill. Instead, they quibble with a bit or two of inconsequential legislative statements referred to in Justice Harlan's dissent in *Jones v. Alfred H. Mayer Co.*, claiming he is taking them out of context.¹⁷

Petitioner's reliance on the editorial comments by several newspapers on the bill as somehow evidencing Congressional intent to regulate private conduct is not only exceedingly weak, but inaccurate. For example, petitioner cites to the *Cincinnati Commercial* of March 30, 1866, raising the spectre of the bill applying to public accommodations such as hotels and theaters. Last minute

¹⁷ Thus, when Justice Harlan quoted an excerpt of Congressman Thayer's remarks about the "tyranny of laws," the petitioner seizes upon an earlier statement where Thayer spoke of "tyrannical acts, the tyrannical restrictions, and the tyrannical laws." Petitioner Brief at 60. Amici find no discrepancy here. Tyrannical laws and laws are of no real effect unless some official or even private person "acts" pursuant to them. In addition, it is hardly a "tyrannical act" if a person decides not to enter into a voluntary contract. If anything, it is tyranny to force such private conduct. This scrap of legislative intent hardly proves petitioner's point. And if petitioner is so concerned with quoting Thayer in context, she seems content to overlook his remarks just one sentence later from Harlan's reference, where Thayer talked about "the ability to make a contract; . . . the ability to sell or convey real or personal estate." Globe at 1152 (emphasis added). Obviously, Thayer is talking in terms of legal capacities, not absolute rights.

editorials, or even a remark made by a bill's opponents to exaggerate the impact of measure to scare off votes, is nearly weightless evidence of intent by those who voted for the bill, just as a dissenting opinion in a court decision does not authoritatively explain the holding of the majority opinion.¹⁹

3. Judicial Enforcement.

While Section 1 of the Civil Rights Act of 1866 was couched in declaratory terms and did not proscribe private conduct, the removal of legal disabilities would themselves remedy the private wrongs petitioner refers to in her brief. By prohibiting the states from incapacitating the freedmen from his right to make contracts, to sue, and to enjoy the equal protection of the laws, those very rights would go a long way to redress the abuses committed against the freedmen.

For example, we are told in the Schurz report that the emancipated Negroes who walked away from the plantations "were shot or otherwise severely punished. . . ." Pet. Brief at 20. By giving the Negro the right to give evidence, their attackers could be prosecuted for murder, criminal assault, kidnapping, and the like. After all, crimes of violence against slaves and freedmen went unpunished since blacks could not testify in a court of law. In addition, by giving the freedmen the legal capacity "to sue," the freedmen could now avail themselves of civil remedies and sue those who would commit violence on them by utilizing common law tort actions of assault, battery, false imprisonment, and the like.²⁰

¹⁹ In any event, once the *Cincinnati Commercial* got its facts straight from the Ohio delegation about the scope of the bill, it changed its views in its April 16 edition. See Appendix B hereto. Other newspapers agreed. See *id.*

²⁰ Indeed, Dred Scott sued his former master Sanford for "trespass vi et armis" (trespass with force and arms) for assaulting him, his wife, and his two children by holding them as slaves in

As for the abuses suffered by the former slaves in their contractual affairs, those too could be remedied by both the right to contract and to sue. Thus petitioner tells us that where "contracts agreed to by the land owners contained fair terms, the employers frequently broke them." Pet. Brief at 22. However, the slaves could now sue for breach of contract, a right which they did not have as slaves. Other abuses such as "defrauding of wages," "extortion," and the like could also be addressed under common law remedies for fraud. Contracts made under duress and so forth could be voided under contract law since there was no voluntary "meeting of the minds." Forcing a freedman to work and then not paying him would subject the employer to a suit for *quantum meruit*. As for disparate treatment of the workers, petitioner states that "[b]y far the most widespread abuse was the beating or whipping of black workers." Pet. Brief at 35. Here again, recourse was now available under tort law for assault and battery.

Accordingly, the remedy for the private abuses suffered by the freed slaves flowed from the legal capacities declared in Section 1, leaving Section 2 of the Act to provide criminal penalties against state officials. Civil actions could also be taken against state officials for violation of the rights in Section 1, including the right to equal protection provided therein.²¹

Missouri. ~~Sanford~~^{Scott} claims he was free when he was taken to Illinois, a free state, and remained so upon his return to Missouri. *Dred Scott v. Sanford*, 112 How. 392 (1856). The Court ruled against Scott on two separate grounds, the first being that Dred Scott was not a citizen of Missouri and thus did not have the legal capacity to sue in the first place. *Id.* at 427.

²¹ As previously noted, *supra* note 13, Congress was able to make itself clear when it was proscribing private conduct as well as providing private rights of action against wrongdoers. See also § 212 (introduced by Senator Doolittle on March 27, 1866 to enforce 13th Amendment) (including a provision in § 4 for civil suit against private wrongdoers to "recover the sum of one thousand

If petitioner is correct that Congress primarily intended to ban private discrimination and provide a civil cause of action in federal court for discriminatory and abusive treatment of the freedmen on the job, where are all the lawsuits that one would expect to have flooded the courts by the abused freedmen? There is not a single lawsuit that petitioner can point to where the abuses she recounts have been adjudicated. Surely, these abuses did not automatically discontinue the day after the law was passed, and are now only rearing their heads 100 years later. Indeed, an examination of the litigation that ensued following passage of the 1866 Act supports amici's interpretation of the "right to contract" clause.

The very first suit filed involving the new Civil Rights Act was instituted on April 11, 1866, just two days after its passage. In *Barnes v. Browning*, (unreported) a Negro had sued his employer for wages in Indiana state court, but the employer defended by arguing that Indiana's Constitution barred Negro immigration and declared null and void all contracts made with such persons, and that a state law stated such persons could not make or enforce contracts. See Flack, *The Adoption of the Fourteenth Amendment* 47-48 (1908). The court ruled that the Indiana Constitution and statute which incapacitated the Negro was void under the first section of the Civil Rights Act. *Id.* The first decision by the highest state court applying this law came shortly thereafter and also was rendered in Indiana. The Indiana Supreme Court ruled that a Negro could sue on a promissory note, striking down the laws incapacitating the black to make contracts. *Smith v. Moody*, 26 Ind. Rep. 299 (1866).

Petitioner highlights *In re Turner*, 24 Fed. Cas. 337, 1 Abb. 84 (1867) as significant because it was a civil suit brought against a white employer for failing to in-

dollars, in addition to all damages sustained by such person, together with the costs of the prosecution"). Neither the Civil Rights Act of 1866 nor Section 1981 refers to such type of actions.

clude certain benefits in the indenture contract that the State of Maryland required to be provided in the indenture contracts for whites. Pet. Brief at 10, n.4. The petitioner cites Chief Justice Chase, sitting as Circuit Justice, as holding that the indenture violates "the first section of the civil rights law enacted by Congress on April 9, 1866." *Id.* In this instance, the petitioner neglected to use an ellipsis, for there is a comma after "1866" and the rest of the sentence reads: "which assures to all citizens without respect to race or color 'full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.'" 24 Fed. Cas. at 339. Thus, this *habeas corpus* action had the effect of striking down the discriminatory state law, and did not discuss the contract clause of the statute.

To be sure, there were suits filed by blacks against common carriers, hotels, and so forth for refusing to admit them, or for giving them second-class accommodations when they paid for first-class, and some of those suits were successful. See Foner Brief at 21. But none of these cases, as far as amici has been able to determine, discussed the contract clause of Section 1 of the Civil Rights Act of 1866. A better explanation of these cases is that under the common law, public carriers and inns had a duty to provide service to all who tendered the required fare or rate. In that regard, they functioned as state actors and were not considered private persons. See Cong. Globe, 43d Cong., 1st Sess. 412 (Cong. Lawrence).

In other cases, there may have been state laws that provided for disparate treatment, or there may have been laws that provided for equal treatment but which were not being followed by the carrier. See, e.g., *The West Chester and Philadelphia Railroad Company v. Myers*, 100 Pa. 209, 215 (1867) (referring to Pennsylvania's "Act of March 1867, declaring it an offense for railroad companies to make any distinction between passengers on account of race or color"). Suits may also have been

lied simply on the grounds of breach of contract or bailment.

In any event, the Civil Rights Act of 1866 was not universally understood to provide a cause of action in these situations, for it was not until Congress passed the Civil Rights Act of 1875, 18 Stat. 335 (1875), that it prohibited discrimination by public accommodations, theaters, inns, and so forth. See Avino, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873 (1966). Even Senator Trumbull, who sponsored the Civil Rights Act of 1866, felt that Congress had no authority to legislate in this area. Cong. Globe, 42 Cong., 2d Sess. 3190. In the notorious *Civil Rights Cases*, the Supreme Court agreed. 109 U.S. 3 (1883).

II. STARE DECISIS CONCERNS DO NOT COMPEL ADHERENCE TO RUNTON.

Stare decisis is a judicially created doctrine that is used by the courts to justify their refusal to overrule erroneous decisions. The underlying principle of that doctrine seems to be that stability in the law and the reliance placed on erroneous decisions are preferable to correcting judicial mistakes. As Justice Brandeis observed, "[I]t is more important that the applicable rule of law be settled than that it be settled right. . . ." *Barnett v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406 (1932). This observation is an overstatement since this Court does not blindly adhere to *stare decisis*; otherwise, no decision would ever be reversed.

Although it is generally stated that the Court is more likely to correct erroneous constitutional decisions than statutory decisions since the latter can be more easily corrected by Congress, the fact is that this Court has frequently overruled many of its statutory cases. Since 1961 alone, this Court has overruled or materially modified statutory precedents more than 30 times. See Esk-

ridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988).

Amici submit that the *stare decisis* concerns articulated by the petitioner in this case are not compelling and that neither stability in the law nor legitimate reliance interests are served by adhering to *Rampton*.

A. *Rampton* Does Not Bring Stability To The Law.

Even though he believed that *Rampton* and *Jones v. Alfred H. Moyer Co.* were wrongly decided, Justice Stevens concurred in the former out of an "interest in stability and orderly development of the law," and because of his belief that the "mores of today" dictate liberal construction of civil rights statutes. 427 U.S. at 189, 191. Justice Stevens also cited Justice Cardozo's remarks that the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." *Id.*, citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921).¹⁰

Amici submit, however, that this interest in stability and settled law is not compelling in this case precisely because the erroneous interpretation given Section 1981 has been unsettling and marked by instability. The petitioner in this case is asking this Court to lay yet another course of bricks on a foundation built on sand. When the Court recently decided to consider whether *Rampton* should be "modified or overruled," it did so "in light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981." *Patterson v. McLean Credit Union*, 108 S.Ct. 1419

¹⁰ Cardozo, however, was writing in 1921 about *stare decisis* in the context of common law, not statutory law, where fidelity to judge-made law as precedent has more application. See generally Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L.R. 611 (1988); Malta, *The Nature of Precedent*, 66 N.C. L. Rev. 347 (1988).

(1988). Nothing in the briefs filed by the petitioner or her supporting amici address these serious concerns of the Court. Rather, the briefs focus on the general aspects of the *stare decisis* doctrine.

As amici noted earlier, *supra* n.3, the petitioner's attempt to bring her case within the language of Section 1981 is premised on the fiction that her single contract at will is a series of multiple contracts made each work day. Other judges are experiencing difficulties in applying *Ruxton* in other contexts as well. For example, in *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987), an alien brought suit against a bank for refusing to issue him a credit card partly because he was not a United States citizen. The alien sued under Section 1981 claiming that the bank refused to enter into a contract for credit with him. In an *en banc* decision, a majority of the court declined to apply *Ruxton* to aliens (even though § 1981 applies to all "persons") stating:

For the reasons expressed by Justice White in his *McCrory* dissent, and echoed by most observers who take the view that words have an ascertainable meaning, it seems to us beyond serious dispute that the reasoning in *Jones* and *McCrory* cannot stand of its own force.

Id. at 1349.

Further unresolved is the reach of Section 1981 into the countless private contracts made every day. Employment contracts include a number of personal relationships voluntarily entered into between parties. As Justice White stated in his dissent, "a racially motivated refusal to hire a Negro or white babysitter" would subject the parents to liability under *Ruxton*'s reading of Section 1981. 427 U.S. at 211. Amici, and no doubt the petitioner as well, do not share Justice Powell's observation in *Ruxton* that while the private school in that case is "clearly" covered under Section 1981, a "kindergarten

and music school . . . are clearly on other side." There is nothing clear about it.

Furthermore, since § 1981 can be invoked by whites as well as by blacks, see *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), one is faced with the anomaly, as Justice White described in *Ruxton*, of a "former slaveowner [being] given a cause of action against his former slave if the former slave refused to work for him on the ground that he was a white man." 427 U.S. at 211. Modern day anomalies can be found as well. In *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982), for example, white merchants, invoking state laws, had sued the NAACP and its local supporters in Claiborne County, Mississippi in 1972 for boycotting their stores and intimidating black customers to keep them from patronizing the targeted businesses. This Court ruled that recovery could be had for damages that were attributed to that part of the boycott that resulted in violence, but not for the peaceful aspects of the boycott protected by the First Amendment. *Id.* at 893.

Under the rationale of *Ruxton*, the plaintiffs in *Claiborne* could have alleged a cause of action under Section 1981 against the NAACP. After all, by boycotting the stores and intimidating others into doing so as well, they were refusing to enter into contracts with others because of their race. In addition, a cause of action under both Sections 1981 and 1982 would clearly have been available to the blacks who wanted to patronize the stores but who were harassed by the enforcers of the boycott (the "black bats"), *id.* at 895 (*cf.* to the "black cavalry" of 1866), had their houses fired upon, *id.* at 904, (*cf. Shreve Temple Congregation v. Cobb*, 107 S. Ct. 2019 (1987)), and had goods purchased in white-owned stores forcefully taken away from them. Refusals to contract with U.S. companies that do business with South Africa could subject the local governmental units or private organizations which have adopted such policies to liability under Section 1981.

The prospect of having Section 1981 apply to peaceful economic boycotts is only one of many examples that demonstrates the open-ended and unsettling nature of the Court's decision in *Rumpson*. Section 1981, as interpreted in *Rumpson*, would create a cause of action for all racially-motivated torts interfering with the enjoyment of any kind of contractual rights, whether caused by the other contracting party or even by third persons. The issue is not whether such results are desirable or undesirable, but whether the Congress or the courts should be making these policy decisions. Instability and uncertainty in the law will continue unless this Court returns to the text and original meaning of the statute. See *Jukason v. Transportation Agency of Santa Clara County*, 107 S.Ct. 1442, 1473 (1987) ("substitution of judicial improvisation for statutory text" in the name of *stare decisis* produces not "stability and order" but rather "instability and unpredictable expansion."); (Scalia, J., dissenting).

B. The Reliance Interests Are Not Compelling.

Another factor considered by the Court in deciding whether to overrule an erroneous decision is to determine whether substantial reliance has been placed on the decision in the form of settled expectations and the growth of institutions on that interpretation. This factor is related to the stability concern, since it is grounded in the notion that people expect stability in the law and plan their lives accordingly.⁴²

⁴² The notion that society expects stability in the law seems to be a curious one inasmuch as Congress, who makes the law, is not only able to change or modify it, but often does so in many regulatory areas which greatly affect the reliance interests of businesses, consumers, and taxpayers. Since society has come to expect such changes in the law, and often lobbies for or against them, why should courts be loathe to change "the law" when in fact, all they are doing by reversing an erroneous statutory interpretation is simply restoring the law to what Congress intended it to be in the first place? Furthermore, if the Court is not hesitant to upset expectations and stability in the law when it examines the validity

Just as Justice Stevens stated in his concurring opinion in *Rumpson*, that "it is extremely unlikely that reliance upon *Jones* [*v. Alfred H. Mager Co.*] has been so extensive that this Court is foreclosed from overruling it," 427 U.S. at 190, so too is it unlikely that the reliance on *Rumpson* has been so extensive to preclude its modification or correction. Since *Rumpson* involves applying Section 1981 to prospective contractual rights, there will be no upsetting of contracts already made. Breaches in contracts are actionable under normal contract law, and discrimination in employment is extensively covered by Title VII and numerous state laws.⁴³

If anything, amici submit that in the area of employment law, expectations and institutions have been established under Title VII and state laws that provide for carefully crafted administrative and judicial procedures to resolve employee disputes, including conciliation provisions. These reliance interests must also be

of the consistent exercise of power by the other coordinate branches, see, e.g., *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), it should not be so reluctant to do the same when the Court itself oversteps its role and usurps the legislative powers of the Congress. Congress should not be continuously pressed into service to correct this Court's mistakes since Congress is faced with other pressing problems and a "docket" no less crowded than this Court's.

⁴³ State laws prohibiting discrimination are in many cases far more expansive than federal legislation. See, e.g., *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 836 A.2d 1 (D.C. Ct. App. 1997) (local human rights law requires religious school to provide facilities and assistance to homosexual student group despite school's religious objections). Indeed, since Section 1981 originally was directed at the states and rooted in concerns of federalism, its non-application to private conduct would not make it a dead letter or "nullity" as petitioner suggests. Rather, it would recognize that the primary purposes of § 1981 have been realized and that states are indeed providing protections well beyond § 1981, as the amici brief filed by the 47 State Attorneys General ably demonstrates.

taken into account. In addition, Section 1981 allows for awards of punitive damages which may be abused.¹⁰

C. Congress Has Not Affirmatively Adopted *Rumson's* Interpretation of Section 1981.

As part of the reliance component of the *stare decisis* argument, petitioner cites a series of legislative developments in the Congress over the years in the civil rights area, and concludes from this chronology that it is "clear that Congress adopted the body of [case] law interpreting sections 1981 and 1982, including application of those provisions to the terms and conditions of employment." Pet. Brief at 97. Congressional amici supporting petitioner similarly assert that "Congress Has Affirmatively Endorsed This Court's Interpretation of Section 1981." Point III of Amici Brief at 20. Congress has done no such thing.

While amici are aware of the general proposition that "Congress is presumed to adopt judicial interpretation of a statute when that statute is re-enacted," *Shapiro v. United States*, 335 U.S. 1, 16 (1948), the fact of the matter is that since 1874, Congress has never re-enacted Section 1981. Admittedly, Congress has enacted related civil rights measures such as the Equal Employment Opportunity Act of 1972 and the Civil Rights Attorneys' Fees Awards Act of 1976, in light of judicial interpretations of Section 1981, but there are many reasons for Congressional inaction or acquiescence other than an agreement with those decisions. As Justice Scalia correctly observed in his dissent in *Johanson v. County of Santa Clara*:

¹⁰ The argument by petitioner and amici American Bar Association that lawyers have relied on Section 1981 in advising their clients of possible avenues of relief for alleged discrimination they may have suffered is of no consequence. Pet. Brief at 104. If that were true, then no case would ever be overturned since presumably lawyers are always advising their clients on what the law is (and more likely what the law should be) as embodied in the erroneous precedent at the time they gave their advice.

The "complicated check on legislation," The *Federalist* No. 62, . . . erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the *status quo*, as opposed to (2) inability to agree upon how to alter the *status quo*, (3) unawareness of the *status quo*, (4) indifference to the *status quo*, or even (5) political cowardice.

107 S. Ct. at 1473 (1987). See also *Cleveland v. United States*, 329 U.S. 14, 21 (1946) (Rutledge, J., concurring).

For example, the petitioner discusses at length Senator Hruska's proposed amendment in 1972 to the Equal Employment Opportunity Act amending Title VII of the Civil Rights Act of 1964, making Title VII the exclusive remedy for employment discrimination. Senator Hruska's amendment was defeated by the Senate after Senator Williams and Senator Javits stated, *inter alia*, that litigants should not be forced to seek remedies in only one place when they frequently "face a large and powerful employer." 118 Cong. Rec. 3372. Shortly before the vote was taken, Senator Williams forcefully argued that Mr. Hruska's amendment "will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that." *Id.* at 3371.

The vote on Senator Hruska's amendment was 33 Yeas, 32 Nays, and 33 not voting. *Id.* at 3373. This evenly split vote in 1972 by one body of the Congress is hardly a ringing Congressional endorsement of judicial opinions that Section 1981 provides a private cause of action, especially since the vote preceded the Supreme Court's decisions in this area. See *Johanson v. Railway Express Agency, Inc.*, 421 U.S. 450 (1975), and *Rumson*, decided in 1976. The vote is also of dubious weight since some of the negative votes may have been cast on the basis of Senator Williams' erroneous statement that Senator Hruska's amendment "would repeal" Section 1981. Senator Hruska's amendment did not propose to repeal 1981, but instead provided for alternative rather than

multiple remedies. See Cong. Rec. at 3173. In addition, Senators voting "nay" may not have wanted to "repeal" a statute that forbade discrimination by public officials, or they may have wanted alternative remedies available for suits against small companies, but multiple remedies against the "large and powerful employer" contemplated by Senator Williams. Since this legislative issue simply was not presented cleanly to the Senators, their intent cannot be discerned.

On the House side, Congressman Erlenborn offered a substitute bill for the bill reported by the House Judiciary Committee. Erlenborn's bill also contained a provision making Title VII an exclusive remedy similar to Senator Hruska's amendment. See Pet. Brief at 87. That substitute bill passed the House by 200 to 195. 117 Cong. Rec. 32111. In the Conference Committee, the House exclusive remedy provision was dropped, and the Equal Employment Opportunity Act of 1972 was passed. The final vote for this law can hardly be characterized by the petitioner as one where "Congress endorsed the judicial interpretation of section 1981" as applying to private employers.

The other major piece of legislation that petitioner cites as evidence of Congress's adoption of *Ryanon* is the passage of the Civil Rights Attorneys' Fees Awards Act of 1976. That law was designed to remedy this Court's decision in *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) which held that ordinarily attorneys' fees will not be awarded absent explicit statutory authorization. The legislation as passed, 42 U.S.C. § 1988, merely provides that a court may award attorneys' fees as costs for civil actions that might be brought under §§ 1981-1983, 1985, 1986. Since Section 1983 already provides for civil actions against state officials, petitioner argues that Congress meant the law to apply to civil actions brought against private individuals under 1981. A vote for this measure does not constitute Congressional endorsement of the *Ryanon* decision any more than the vote in 1972 on the EEO Act.

Congressmen may have voted for the legislative package because they supported the award of attorneys' fees under sections other than § 1981, but did not want to cast a negative vote against the entire bill. Others may have felt that ~~the~~ *Ryanon* was wrongly decided, but that if Congress was going to allow for attorneys' fees in all these cases, it should be allowed across the board.²⁰

If, as we contend, this Court should reverse or modify *Ryanon*, Congressional amici supporting respondent are prepared to debate and enact whatever legislation is necessary to remedy any "gaps" in the law. Indeed, with a virtual veto-proof number of Senators supporting the petitioner as amici, and a substantial number of members of the House of Representatives, any "gap" would surely not go unfilled. While there is a risk that any "remedial" legislation may go far beyond the ruling in *Ryanon*, as was done in the aftermath of *Grove City College v. Bell*, 465 U.S. 555 (1984), and thus may cause some delay in the legislative process, that is the price one must pay if we are to show fidelity to the separation of powers and the Constitution which reposes "all legislative Powers" in the Congress, Art. I, sec. 1.

In contrast, Congressional amici supporting petitioner appear all too willing to allow the Court to usurp their legislative powers:

The Congress' primary role in lawmaking under the Constitution dictates that any change in the meaning of the statute be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court's interpretations of its statutes. For this reason, *stare decisis* . . . operates with its greatest strength where a statutory interpretation, such as *Ryanon*, is concerned.

Congressional Brief at 3.

²⁰ While petitioner cites a House Judiciary Committee Report discussing Section 1981 cases, the *Ryanon* decision was not listed. Pet. Brief at 93.

It is especially important that the Court correct erroneous decisions that expand the intended scope of statutes in areas that generally cover "good government" topics such as environmental, civil rights, and consumer protection laws, not only because Congress has a full calendar already and cannot always deal with erroneous decisions, but because of the additional burden placed on the passage of correcting legislation perceived to be "cutting back" in these areas when the law is only being restored to its original meaning. Thus, by leaving *Rapson* intact, the Court would in essence be given an incentive to read such statutes broadly rather than narrowly, allowing the law to be amended judicially in one direction in a ratchet-like manner. Better for the Court to err on the side of judicial restraint and fidelity to the statute, such as it did in *Grove City* and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (ruling that Title VII did not cover discrimination based on pregnancy), ~~and~~ thereby allowing the Congress to expand the statute's reach if it chooses, rather than the other way around and usurping Congress' powers.

CONCLUSION

The integrity of and respect for this Court ^{are} enhanced by following the rule of law. In deciding this case, the Court should not succumb to what it perceives, either rightly or wrongly, to be the "mores of the day." For the reasons stated herein, the decision in *Rapson v. McCrory* should be reconsidered, and either be overruled or modified.

Respectfully submitted,

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APPENDIX A

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members and supporters throughout the United States. WLF engages in litigation and administrative proceedings in matters promoting the free enterprise system and the economic and civil rights and liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination.

In its pursuit of its view that the equal protection clause and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. See e.g., *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *City of Richmond v. Croson*, No. 87-998 (S. Ct. 1988).

Congressional *amici* Congressmen Henry Hyde, *et al.*, are here to assert and preserve their legislative interests under Article I of the Constitution. They are concerned that the Court has all too often usurped the powers of the Congress in adjudicating cases before it, and desire to have this Court perform its function under Article III by faithfully interpreting the statutes of Congress as enacted.

The Lincoln Institute for Research and Education, named after Abraham Lincoln, was founded in 1978 to study public policy issues that impact on the lives of black middle America, and to make its findings available to elected officials and the public.

The Institute, based in Washington, D.C., aims to reevaluate those theories and programs of the past

decades which were highly touted when introduced, but have failed to fulfill the claims represented by their sponsors—and in many cases, have been harmful to the long-range interest of blacks. The Institute is dedicated to seeking ways to improve the standard of living, the quality of life and the freedom of all Americans, and has also appeared as *amicus* in *City of Richmond v. Croson*.

Amicus the Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* in this Court on several occasions in cases involving individual rights.

APPENDIX B

Cincinnati Commercial, April 16, 1866 (p. 4)

"The Civil Rights Bill reduced to the facts and adapted for practice does not seem to have the portentous proportions which it assumed in theory while under discussion. Congressmen who support it declare that it has no operation whatever in three-fourths of the loyal States (including Ohio) and none in three or four of the rebel States, that it does no more than our military commanders are doing in the Southern States where the Black Codes are unrepealed and is intended a law simply authorizing to be done what the President is doing. A few months experience will develop the scope and bearing of this measure and possibly may go far to settle the differences between the President and Congress by showing that they were in many particulars unsubstantial."

Philadelphia North American, April 10, 1866 (p. 1, col. 1)

"It secures to all such, without any distinction of race or color, the right to testify in courts of justice, or in law proceedings of any kind; to sue and be sued; to plead and to be impleaded; to hold property; to conduct business; to be free from outrage in person or property, and to enjoy all the liberties peculiar to our institutions except suffrage. This does not, however, include any right to sit on juries or to hold office, or to go in any car, coach, hotel, church, public place, etc., where the local regulations prohibit it. It, in fact, is only a law to protect the rights of persons and property. It does not undertake to deal with political rights at all, nor does it meddle with the social position of any race or class."

FOR ARGUMENT

Supreme Court, U.S.

FILED

AUG 13 1988

JOSEPH P. SPANGL, JR.
CLERK

No. 87-107

In the Supreme Court of the
United States,

October Term 1987

Brenda Patterson, Petitioner

v.

McLean Credit Union, Respondent

On Writ of Certiorari to the

United States Court of Appeals

For the Fourth Circuit

Brief Pro Se of J. Philip Anderegg,

a Member of the Bar of the

Supreme Court of the United

States, as Amicus Curiae

Supporting Respondent

J. Philip Anderegg,

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August, 1988

QUESTION PRESENTED

This brief for J. Philip Anderegg as amicus curiae deals only with the question that the Court in its order of April 25, 1988, asked the parties to address on reargument: Whether the interpretation of 42 U.S.C. § 1981 adopted by this Court in Burton v. McCrary, 427 U.S. 160 (1976), should be reconsidered.

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In The

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October Term, 1987

No. 87-107

Brenda Patterson, Petitioner,

v.

McLean Credit Union, Respondent.

On Writ of Certiorari to the United

States Court of Appeals for the Fourth

Circuit

BRIEF OF J. PHILIP ANDEREGG AS AMICUS

CURIAE SUPPORTING RESPONDENT

This brief is submitted, on the written consent of the parties, on behalf of J. Philip Anderegg, a member of the Bar of this Court, appearing pro se, as amicus curiae in support of the respondent. Letters of consent from the parties have been lodged with the clerk.

INTEREST OF AMICUS CURIAE

The interest of J. Philip Anderegg is that of a lawyer, a member of the Bar of this Court, desirous of seeing clarity, simplicity, and knowability in the law.

SUMMARY OF ARGUMENT

EMBROS v. McCREARY, 427 U.S. 160 (1976), holding 42 U.S.C. § 1981 to prohibit private acts of discrimination in the making of contracts, was wrongly decided and should be reconsidered because:

1) the language and plain meaning of § 1981 do not support that holding;

2) the legislative history of that section, while showing a desire on the part of many members of the 39th Congress which enacted /the Civil Rights Act of 1866 to provide a Federal remedy for tortious and criminal private acts by whites against

newly emancipated blacks in the immediate post-Civil War period, does not show significant support for compelling whites, or anyone else, to make (i.e. to enter into) contracts with other persons, of whatever race, even when the reluctance or refusal on the part of one party to a proposed contract was based on racial animosity toward the other party to the proposed contract;

3) if Ex parte was rightly decided, then § 1981 should prohibit acts of private discrimination against aliens on the ground of their alienage. Such a result would be not only unjustified by the language and history § 1981; it would be in clear conflict with § 2740(a) of the Immigration and Nationality Act (8 U.S.C. § 1324b(a)) as added by § 102 of the Immigration Reform and Control Act of 1986, P.L. 99-603;

4) REUNION. If maintained, will leave us with an undesirable (or worse) future case-by-case determination of the separation of "the type of contract offer within the reach of § 1981 from the type without" (Justice Powell, concurring, in REUNION at 427 U.S. 188).

ARGUMENT

I. THE PLAIN LANGUAGE OF § 1981 DOES NOT SUPPORT REUNION.

That "the same right ... to make ... contracts ... as is enjoyed by white citizens" conferred by § 1981 on "[a]ll persons within the jurisdiction of the United States" cannot include a right in A to compel B to make a contract with A, no matter what the basis of B's unwillingness, because white citizens did not "enjoy" such a right at the time of enactment of either the Civil Rights Act of 1866 or the Voting Rights Act of 1870.

has been set forth in the dissent of Justice White in Exxon and in Bhandari v. First National Bank of Commerce, 808 F.2d 1082 (5 Cir. 1987. Hereinafter "Bhandari I") at 808 F.2d 1092-93 better than I can. Hence I will not weary the Court with further words on the subject.

II. THE LEGISLATIVE HISTORY OF

§ 1981 DOES NOT SUPPORT REUNION.

As part of its argument directed to the legislative history of § 1981, Petitioner's Brief on Reargument argues at length (pp. 14 to 54) that the 39th Congress intended section 1 of the Civil Rights Act of 1866 to bar all racial discrimination, private as well as state-action-based. As to private discrimination that brief sets forth material presented to Congress concerning torts and crimes committed by whites against blacks in the South after the emancipation

of the slaves. It also sets forth material concerning the imposition by whites of overreaching, abusive terms in the contracts of employment which whites made with former slaves, and breaches by whites of those contracts, e.g. refusals to pay wages due. The understandable angry reaction of members of Congress to this material is also set forth.

By far most of this material pertains however, in the terms of Bhandari I, to what Bhandari I calls the third (and "best") of this Court's arguments in Jones v. Alfred N. Mayer Co., 392 U.S. 409 (1968) to support the proposition that § 1 of the 1866 Civil Rights Act reaches private discrimination. See 808 F.2d at 1092 and 1094-95. But as Bhandari I notes (808 F.2d at 1095), the congressional desire aroused by evidence of private injustices

against blacks was a desire "to eradicate racist practices beyond those the language of the statute [the Civil Rights Act of 1866] appears to reach." That Congress knew of, and was angered by, torts, crimes and breaches of contract committed by whites against blacks does not justify expanding § 1981 to cover racially motivated refusals to make contracts.

As Bhandari I explains (808 F.2d at 1095), the history of the 1870 Act

is completely different. It leaves no doubt that Congress was concerned with legal discriminations against aliens by the states alone.

The 5th Circuit's reasons for so saying are set out at 808 F.2d 1095-97, and its views to the same effect are set out in even greater detail in its subsequent en banc decision of the same name dated October 5, 1987 (hereinafter "Bhandari II") reported at 829 F.2d 1343. See 829 F.2d

at 1345-48.

In Rhandari II, the full bench of the 5th Circuit overruled the earlier 5th Circuit decision of Guerra v. Manchester Terminal Corp., 498 F.2d 641 (1974) which had held that §1981 does forbid private discrimination based on alienage. A Petition for Certiorari, No. 87-1293, was filed in this Court on 2/2/88 for review of Rhandari II.

III. BUNYON IMPOSES ON § 1981 A CONFLICT WITH THE RIGHTS OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT UNLESS, INCONGRUOUSLY, that section is held to FORBID ONLY STATE-ACTION-BASED DISCRIMINATION AGAINST ALIENS. NOTWITHSTANDING ITS PROHIBITION, UNDER BUNYON, OF PRIVATE ACTS OF DISCRIMINATION AGAINST CITIZENS.

Justice White's dissent in BUNYON

points out the "logical impossibility" (427 U.S. at 206) of holding, as Runyon does, that U.S. citizens are protected by § 1981 against private acts of discrimination whereas aliens are (he supposed to be beyond discussion) protected by the same language only against state-action-banned discrimination. Absent action by Congress, not to be counted on, and if Runyon is left undisturbed, either our law (judge-made) will accept this logical impossibility (to the discredit of the law, I submit), or it will, in the teeth of the historical evidence as to the 1870 Civil Rights Act detailed in the Shandari opinions, hold that aliens like citizens are protected by § 1981 against private acts of discrimination.

This latter is an equally undesirable, indeed a wholly unacceptable outcome. Under section 274B(a) of the Immigration

Act, 8 U.S.C. § 1324b(a)) added by § 102 of P.L. 99-603, the Immigration Reform and Control Act of 1986, it is an "unfair immigration-related employment practice" to discriminate against an alien on the ground of his alienage ("citizenship status"), but only if the alien is lawfully admitted, is admitted as a refugee, or is granted asylum, and in any of those cases has completed a declaration of intention to become a citizen -- and has followed up that declaration within time limits and with results not necessary to be set out here. Moreover, under that same section 274B(a) an employer may systematically prefer a citizen over an alien if the two are equally qualified.

I think it fair to call a conflict a situation wherein one law prohibits conduct which another law, by careful choice of language does not, and that is the situat-

ion here.

The way to avoid both horns of the dilemma is to overrule Runyon and bring § 1981 back to a prohibition of discrimination by state action only.

IV. RUNYON SHOULD BE RECONSIDERED, AND OVERRULED, BECAUSE IT CANNOT BE APPLIED TO ALL CONTRACTS, AND BECAUSE THE "CASE-BY-CASE" METHOD OF DETERMINING THE LIMITS OF THE RUNYON RULE LEAVES THE PUBLIC IN IGNORANCE UNTIL THE JUDICIARY IS LED BY THE ACCIDENTS OF LITIGATION TO SPEAK. THIS IS NOT A SYSTEM OF LAW FOR A FREE PEOPLE.

Concurring in Runyon, in important part because he thought the case did not involve a personal contractual relationship such as one in which the offeror selects those with whom he desires to bargain on an individualized basis. Justice Powell conceded (427 U.S. at 187-89) that

some offers to contract should be outside the reach of Runyon. He also recognized that it might be (and I submit that it clearly is) impossible to draw a "bright line" easily separating the type of contract offer within the reach of § 1981 (given the Runyon decision, he surely meant) from the type without, i.e. outside it. Justice White expressed similar, and more acute misgivings in his dissent (427 U.S. at 212). I make bold to urge upon the Court that certainty, clarity and knowability of rules of law are a high value, for a free people, and that they are set at an undesirable discount by Runyon.

CONCLUSION

I leave to the parties other issues. With respect however to the issue of stare decisis, I urge the following: Runyon is an example of the use of legislative history to make a statute mean something

which it does not say. As such I submit that it is wrong. And it is only one example of a growing, and I think pernicious, tendency in American law. The Court ought to correct this error by overruling Runyon. If Congress wants to make more private acts of discrimination illegal than it has so far, e.g. in the Civil Rights Acts of 1964 and 1968, and if it has the power under the Constitution to do so, then that is Congress' prerogative to do. And it would help our country if Congress learned that precision in the drafting of statutes is vital, and that courts will not fill out lacunae in statutes by combing through legislative reports and debates.

Respectfully submitted,

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No. 87-107

Supreme Court, U.S.

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Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE FOR THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE RESPONDENT
ON REARGUMENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-107

BRENDA PATTERSON,
v. *Petitioner,*

MCLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE FOR THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE RESPONDENT
ON REARGUMENT**

The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the Respondent. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary, nonprofit association organized to promote sound government policies pertaining to nondiscrimination in employment. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a board of directors composed of experts in equal employment opportunity and affirmative action. Their combined experience gives the Coun-

cil a unique depth of understanding of the practical, as well as the legal, aspects of equal employment policies and requirements. All of the Council's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members will be directly affected by a decision in this case on the issue of whether the Court should reconsider its decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), which held that 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts. See also, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Section 1981 affords a federal remedy against discrimination in private employment on the basis of race.) Section 1981 plaintiffs may have their claims heard before a jury and, if successful, can receive extensive relief—including punitive damages and compensatory damages, such as for pain and suffering.

In resolving the issue of the reach of § 1981 and its impact on potential plaintiffs, the Court is likely to delve in some depth into the legislative history of § 1981 and the intent of the sponsors when the statute was enacted well over a century ago. That history will be covered extensively by the parties and other amici. EEAC's brief does not take a position on the meaning of this history or on whether *Runyon v. McCrary* should be overruled. EEAC submits, rather, that however the Court decides the case on the merits, reconsideration of *Runyon* is warranted because it will afford an opportunity for the Court to address and explicate, if not resolve, the practical effects of § 1981's coexistence with other, fundamentally inconsistent statutory schemes for remedying private employment discrimination.

EEAC's brief thus concentrates on the fact that § 1981 exists alongside of—and often in conflict with—numerous other federal, state, and local employment discrimination statutes, executive orders, wrongful discharge

causes of action and collective bargaining agreements, all of which may provide an avenue of relief for an individual for the same alleged racial discrimination.

More specifically, while this Court has noted that § 1981 and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. provide "independ[ent] . . . avenues of relief" (*Johnson*, 421 U.S. at 460), experience over the past decade has shown that those avenues not only are independent, but often are fundamentally conflicting and antithetical. Thus, § 1981 relies exclusively on private individual court suits, spurred by undefined damages designed to punish the employer and provide damages for pain and suffering. Title VII eschews immediate resort to the courts, requires administrative investigation and conciliation, and imposes damages which are primarily of a "make whole" nature.

The fundamental policy and enforcement problems caused by this legislative dichotomy never were addressed in a meaningful manner, either when Title VII was enacted in 1964, when it was amended in 1972, or in prior decisions of this Court. What this Court says in this case about the existing civil rights structure in terms of its effects on enforcement, conciliation, efficiencies, inconsistencies and impact on the judiciary, will be extremely important not only for the enforcement of those statutes, but also in any future Congressional debates related to this Court's decision.¹

The briefs in *Johnson v. Railway Express* did not address in any detail the negative effect on public anti-discrimination policy of conflicting side-by-side statutory schemes. Rather, the issue in that case was limited to "whether the timely filing of a [Title VII] charge of employment discrimination . . . tolls the running of the period of limitation applicable to an action based on the

¹ See Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as Amici Curiae in Support of Petitioner.

same facts, instituted under 42 U.S.C. § 1981." 421 U.S. at 455.

Moreover, although a number of lower courts had ruled that § 1981 prohibits private employment discrimination on the basis of race (see *Johnson*, 421 U.S. at 460-61 n.6), the Respondents in *Johnson* "[did] not challenge those decisions [t]here, and therefore the question of the scope of Section 1981 [was] not before the Court." Brief for the United States as Amicus Curiae in *Johnson v. Railway Express*, at 12 n.6. Thus, the Court's statements in *Johnson* that § 1981 applies to private employment discrimination were not addressing the precise issue upon which review had been granted and, consequently, many of the arguments advanced in this brief were not briefed to the Court. In short, there has not been a "full airing of all the relevant considerations" (*Mouell v. Dept. of Social Services of City of N.Y.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring)) that bear on the relationship between Title VII and § 1981.

In addition, in deciding this case, the Court should keep in mind that aside from Section 1981, numerous other avenues of relief are available for race-based employment discrimination. See *Patterson v. McLean Credit Union*, 108 S.Ct. 1419, 1422 (1988) (dissenting opinions of Justices Blackmun and Stevens). For example, an individual employed by a federal contractor with at least 15 employees has numerous independent avenues of relief wholly apart from § 1981, each of which may be pursued *simultaneously*. These include:

- Title VII;
- Executive Order 11246;
- Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (if the employer receives federal financial assistance);
- anti-discrimination statutes in virtually every State, and numerous local statutes and ordinances;

- state and local executive orders prohibiting discrimination and requiring affirmative action;
- state court suits (where available) for wrongful discharge based upon contract, tort or other theories (often with jury trials and punitive and compensatory damages);² and
- grievance proceedings, arbitration and federal suits under § 301 of the National Labor Relations Act for breach of collective bargaining obligations where a union contract exists.³

Thus, at least with respect to employment discrimination, even if *Ryanon v. McCrary* is reversed, employers still will have substantial incentives to avoid employment discrimination.

EEAC is well-qualified to brief the Court on the implications of its decision in this case on federal civil rights enforcement, having participated as amicus curiae in the initial briefing of this case, as well as in numerous other cases involving § 1981 and Title VII issues.⁴

² See *Lingle v. Norga Division of Maple Chef, Inc.*, 108 S.Ct. 1877 (1988), which increases the ability of plaintiffs to sue under various state wrongful discharge theories even if a collective bargaining agreement also applies to the same situation.

³ See *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) (right to sue under Title VII not encumbered by prior submission of claim to arbitration); *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (filing a grievance under a collective bargaining agreement does not toll Title VII's charge filing requirements); and *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (no preclusive effect need be given to labor arbitration awards).

⁴ See, e.g., *Goodman v. Lubron Steel Company*, 107 S.Ct. 2617 (1987) (Section 1981 statute of limitations); *St. Francis College v. Al-Kanzarji*, 107 S.Ct. 2022 (1987) (Section 1981 and national origin discrimination); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981 standard of proof); *Great American Savings & Loan Assn. v. Novotny*, 422 U.S. 366 (1975) (42 U.S.C. § 1985(3) does not apply to a conspiracy to violate Title VII); *IUE, Local 790 v. Robbins & Myers*, 429

STATEMENT OF THE CASE

This case arose out of a race-based discrimination suit filed by Brenda Patterson under 42 U.S.C. § 1981. She alleged that she had been a victim of race discrimination by her employer. In particular, she alleged that she was subjected to racially-motivated harassment and that she was denied a promotion because of her race. Her claim of promotion discrimination was submitted to a jury, which returned a verdict for the employer. The correctness of the district court's jury instruction on the promotion issue was considered in the first hearing before this Court, and EEAC's initial brief argued that the instruction was correct.

Also at issue was whether the Fourth Circuit was correct in ruling that a claim for racial harassment is not cognizable under § 1981. These issues were not addressed by EEAC nor resolved by the Court, which instead ordered reargument on the following question:

Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Rumson v. McCrary*, 427 U.S. 160 . . . should be reconsidered.

In dissenting from this order, Justice Blackmun stated that it is "probably true that most racial discrimination in the employment context will continue to be redressable under other statutes. . . ." *Patterson v. McLean Credit Union*, 108 S.Ct. 1419, 1422 (1988). Similarly, Justice Stevens' dissenting opinion pointed out that ". . . the present case involves a claim of discrimination in the workplace, an area of the law where there is substantial overlap between 42 U.S.C. § 1981 and Title VII . . . 42 U.S.C. § 2000e, et seq." *Id.* It is the interrela-

U.S. 229 (1976); *EEOC v. Commercial Office Products Company*, 56 U.S.L.W. 4424 (U.S., May 17, 1988) (analysis of Title VII's requirement of deferral to state agencies as an alternative to court suit); and *Lingle v. Norge Division of Magic Chef, Inc.*, 107 S.Ct. 1877 (1988) (effect of federal law on state wrongful discharge suits).

tionship between these two statutory schemes that is the primary focus of this amicus curiae brief.

SUMMARY OF ARGUMENT

In discussing the applicability of § 1981 to employment discrimination, this Court has stated that § 1981 and Title VII provide "independ[ent] avenues of relief" (*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975)). The Court, however, also has recognized that the filing of a § 1981 suit can deter Title VII conciliation and that such a lawsuit is "privately oriented and narrow, rather than broad, in application, as successful [Title VII] conciliation tends to be." *Id.*, 421 U.S. at 461.

Thus, this and other courts often have expressed concerns that because of Title VII's administrative requirements, § 1981 will, "by perverse operation of a type of Gresham's law" drive the use of Title VII "out of currency." *Brown v. General Services Administration*, 425 U.S. 820, 833 (1976). See also *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 376 (1979) ("Perhaps most importantly, the complaint could completely bypass the administrative process which plays such a crucial role in the scheme established by Congress in Title VII."). Because § 1981 was not widely used in the employment context until after the 1972 Title VII debates, Congress has never addressed meaningfully the fundamental inconsistencies between the two statutes.

Moreover, this Court's Title VII decisions provide many benefits for charging parties. Liberal construction of time filing requirements, and the EEOC's investigatory and enforcement authority, have assured that the EEOC—unlike private litigants—can pursue enforcement actions that "are not limited to the claims presented by the charging parties" and are unencumbered by the limited class representative requirements of Rule 23, Fed. R.Civ. Pro. *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 331 (1980).

Private plaintiffs alleging employment discrimination have multiple avenues of relief besides § 1981, including Title VII, state and local laws and executive orders, wrongful discharge suits and collectively bargained dispute-resolution mechanisms. But as this brief shows, Title VII and § 1981 often work at cross purposes. As a result, the use of § 1981 to cover employment discrimination may be impeding Congressional intent that Title VII be the primary means of dealing with employment discrimination on the federal level.

ARGUMENT

I. THIS COURT SHOULD RECONSIDER *RUNTON v. McRAE* IN ORDER TO ADDRESS THE FUNDAMENTAL, UNRESOLVED CONFLICT BETWEEN THE LAWSUIT-ORIENTED APPROACH OF SECTION 1981 (WITH JURY TRIALS AND PUNITIVE AND COMPENSATORY DAMAGES), AND THE ADMINISTRATIVE CONCILIATION REQUIREMENTS OF TITLE VII—A CONFLICT THAT INTERFERES WITH CONGRESS' INTENTION THAT TITLE VII BE THE PRIMARY MECHANISM TO RESOLVE CLAIMS OF RACE-BASED EMPLOYMENT DISCRIMINATION

A. Section 1981 Was Not Generally Recognized As An Available Remedy For Employment Discrimination When Congress Enacted And Amended Title VII

Despite the extensive arguments over the legislative history of the 1866 Civil Rights Act set out in the briefs of Petitioner and supporting amici, there is no real question that § 1981 "lay essentially dormant" for more than a century before it was used in any meaningful manner in the employment discrimination context.⁵ Indeed, it was

⁵ Richey, *Manual on Employment Discrimination and Civil Rights Actions in the Federal Courts*, at D-1 (1987). Unlike Title VII, Section 1981 does not mention employment discrimination and has no administrative enforcement mechanism. Rather, immediate resort to the federal courts is required under § 1981, which provides:

[Continued]

not until the 1968 decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that the Court held that § 1981 provided a right to an individual to sue for racial discrimination in *private*, as well as public, sale or rental of property. Until that decision, there had been no conclusive ruling by the Court that § 1981 was not limited to contract-related discrimination by public entities.

Moreover, it was not for another seven years, until 1975, that the Court stated that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Thus, this Court's ruling on this crucial issue was not handed down until *after* the Congressional Title VII debates in 1964 and 1972—the only two times when Congress has taken a comprehensive look at race-based employment discrimination.

Any meaningful discussion of the use of § 1981 to remedy employment discrimination must recognize that until the mid-1960's, there was—as a practical matter—no useful federal remedy for employment discrimination. Indeed, although the Fifth Circuit preceded this Court in finding a § 1981 cause of action for employment claims, it also limited back pay under § 1981 to the effective date of Title VII. See *Johnson v. The Goodyear Tire & Rubber Company*, 491 F.2d 1364, 1378 (5th Cir. 1974). The Fifth Circuit stated:

We think that a balancing of equities presented by the whole area of employment discrimination demands that back pay claims under § 1981 be limited to July 2, 1965, the effective date of Title VII. *It was not until that date that the employers clearly*

⁶ [Continued]

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

became aware that they would be held accountable for employment discrimination. Our revitalization of § 1981 did not occur until 1970. In our opinion, it would be unjust to impose liability before the effective date of Title VII even though we are aware that the two provisions have been interpreted to be procedurally independent in our Circuit.

491 F.2d at 1378-79 (emphasis added). Thus, in the 1970's, there was no experience as to how effectively § 1981 would work in carrying out a long-dormant Congressional mandate to eliminate private employment discrimination. This Court may consider on rehearing whether there was, in fact, any such mandate from the Congress that passed the Reconstruction-Era Civil Rights statutes in the mid-1860's. But, regardless of how the Court ultimately rules, its reconsideration of that issue should not be undertaken in a historical vacuum. The Court is now in a position to assess the practical implications of § 1981's coexistence with other, more recently enacted remedies for employment discrimination, and this case presents a rare vehicle in which to do so.

B. The Remedial Schemes Established By Section 1981 And Title VII Have Fundamental Inconsistencies

1. Section 1981 Relies On Immediate Resort To Litigation And Provides Remedies That Are Fundamentally Punitive And Undefined

Section 1981 relies for its enforcement on direct resort to civil litigation. Its remedies are essentially punitive and undefined. It provides several important procedural inducements to plaintiffs that are not available to Title VII charging parties. These inducements include:

- punitive damages;
- compensatory damages (including damages for pain and suffering);
- jury trials;
- longer statutes of limitations;
- no need to wait for the EEOC to investigate the charge and issue a right-to-sue letter; and

—no limitation on back pay to two years prior to the filing of a charge.⁶

In practice, these procedures are often used to extract from defendants settlements that bear little relationship to the degree of damages suffered by the plaintiff.

As one commentator has pointed out, the "fiscal consequences" of proceeding under 1981 can be enormous. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 Cornell L. Rev. 258, 285 (1977). "Compensatory and punitive damages—both available under the Reconstruction Acts—can easily amount to millions of dollars." *Id.*, at 285. Thus, the possibility of recovering such damages "encourages plaintiffs to seek redress in the many cases where actual injury is too small to warrant a suit for compensatory damages alone." *Id.*, at 287.

Indeed, because of the large potential damages awards, there is a great deal of truth to the now-standard irony shared by employment discrimination litigators that it is virtually malpractice for a plaintiff's attorney to file a Title VII charge with the Equal Employment Opportunity Commission (EEOC) in a race-discrimination case, instead of filing a federal or state court suit under § 1981 and some theory of wrongful discharge where available.⁷

Moreover, even when a Title VII charge is filed, a § 1981 complaint also may be filed at the same time, or at some later time before the longer § 1981 limitations

⁶ See Brief for Petitioner on the merits, at pp. 58-61; *Johnson v. Railway Express*, 421 U.S. at 460 (jury; damages; back pay); and *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987) (limitations period). See also, Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S.Cal.L.Rev. 961, 965-970 (1977).

⁷ See Brooks, 62 Cornell L.Rev. at 260, which argued that "it is prudent for an attorney to file suit under more than one statutory provision, so as to assure survival of the action beyond the pretrial stage and maximize the chances for success at trial.

period runs out. As was pointed out to the Court in *Johnson v. Railway Express*:

the fact is that Section 1981 is commonly thrown into complaints based on Title VII principally for the purpose of avoiding defects in the complaint arising out of failure to comply with one or more of the requirements of Title VII.²

The Title VII charge may be broader in scope than the § 1981 complaint, as, for example, when a charge alleging race and sex discrimination under Title VII is filed concurrently with a § 1981 race claim. This may lead to procedural complications if the cases are consolidated for trial. For example, the Court may determine that the race discrimination issues are appropriate for jury consideration but the sex discrimination claims are not.

Another common plaintiff's tactic is to file a Title VII charge, thereby triggering an EEOC investigation which is conducted at agency expense and which costs nothing to the charging party or his attorney. Often this investigation is lengthy and complex and a great deal of information is developed. The information in the EEOC's investigative files must be turned over to the charging party or his attorney once his Title VII suit is "instituted." See 29 C.F.R. 1601.22 (1979); and *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

The information developed by EEOC thus can be used as the basis for the plaintiff's private lawsuit. Typically, the plaintiff's complaint will be based on § 1981, as well as Title VII. Since the limitations period for filing a

² Brief for Respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, p. 16, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). See also Reiss, 50 S.Cal.Rev. at 1025:

The primary present use of the Civil Rights Acts of 1866 and 1871, therefore, is simply as a safeguard against the procedural pitfalls of Title VII, in areas covered by that statute. No plaintiff should fail to allege claims under one or more of these statutes and Title VII, whenever applicable. (Emphasis in original)

§ 1981 suit often will not run out until after the EEOC investigation is complete, the case can proceed through the EEOC investigation and conciliation periods before the employer is even aware that a § 1981 suit is contemplated.

A plaintiff thus can obtain the relevant information for a private suit without incurring substantial attorney's fees for this investigation that would not be awardable unless he prevailed at trial. See 42 U.S.C. § 1988, which provides attorney's fees only to a "prevailing party." This tactic essentially subverts Title VII's emphasis on conciliation and administrative resolution of charges.

As this discussion demonstrates, § 1981 provides significant inducements to plaintiffs and their counsel, who, not surprisingly, regularly resort to § 1981 even when proceeding simultaneously under Title VII. But, as now shown, encouraging such dual proceedings tends to thwart the public interest and the goals established by Congress in enacting Title VII.

2. Title VII Discourages Initial Resort To The Federal Courts And Establishes Voluntary Compliance And Conciliation As The Nation's Primary Policy For Eliminating Employment Discrimination

Even though this Court has stated that Title VII and § 1981 provide independent avenues of relief, it also has recognized the inherent conflict between these statutes. Thus, the Court stated in *Johnson v. Railway Express*, 421 U.S. at 461:

We recognize, too, that the filing of a lawsuit [under § 1981] might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be.

A review of Title VII's administrative scheme demonstrates the fundamental differences from § 1981.

The primary focus of Title VII is on administrative enforcement and voluntary compliance, not on federal court litigation. Thus:

In the Equal Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." When "the Commission [is] unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . ."

Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 359-60 (1977) (footnotes omitted).

Indeed, Title VII not only provides for prior review by the EEOC; it also contains the requirement that state agencies be given:

an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated. . . . Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed, or until 60 days had passed, whichever came sooner.

Mohasco Corp. v. Silver, 447 U.S. 807, 821 (1980) (emphasis added). *Accord*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (deferral provisions give state agencies an opportunity "to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of discrimination").

Thus, Section 706(b) of Title VII was "clearly intended to increase the role of States and localities in resolving charges of employment discrimination." 447 U.S. at 820.

Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

New York Gaslight Club, Inc., v. Carey, 447 U.S. 54, 65 (1980) (awarding Title VII attorney's fees to the charging party for legal work performed before the state deferral agency) (emphasis added).

In addition to this preference for administrative enforcement, Title VII does not provide for a jury trial, and its "make whole" remedial provisions do not provide for punitive or compensatory damages (such as damages for pain and suffering.) See *Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977), and cases cited. Instead, Title VII's thrust is to encourage conciliation and resolution without resort to federal court litigation.

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment

opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added). *Accord*, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982), (voluntary compliance can end "discrimination far more quickly than could litigation proceeding at its often ponderous pace").

As we will show more fully below, these fundamental differences between Title VII and § 1981 were never fully considered by Congress or by this Court in *Johnson*, but they have bedeviled the courts ever since § 1981 came to be recognized as providing a remedy for race-based employment discrimination.

C. The Conflict Between The Two Remedial Schemes Was Not Meaningfully Addressed In The Title VII Debates in 1964 and 1972

Because § 1981 has only recently been applied to private contracts, there was very little judicial analysis of its impact on employment discrimination in existence when Congress enacted and amended Title VII. Thus, it is not surprising that the Congressional Title VII debates provided little insight into whether § 1981 and Title VII were compatible. To read the briefs of Petitioner and supporting amici, one would gain the impression that Congress had made a reasoned policy decision after taking the Reconstruction Era legislation into account. That, however, simply was not the case.

The two most pertinent pieces of legislative history were the rejection of two amendments—the Tower

Amendment in 1964 and the Hruska Amendment in 1972. In neither instance did Congress show any awareness of the problems it was creating by the juxtaposition of two quite different statutory schemes.

1. The 1964 Tower Amendment

The Petitioner argues that when Congress in 1964 rejected Senator Tower's Amendment which would have made Title VII the exclusive remedy for employment discrimination, it was "clear that members of the Senate, including Senator Ervin, believed that § 1981 already prohibited such private discrimination," and that the Senate's rejection of the Tower Amendment, "ma[de] clear its intent to retain other statutory remedies." Petitioner's Brief on Reargument at 76.

The Tower Amendment, however, was not directed at limiting private suits brought under § 1981—indeed, § 1981 was not even mentioned in the debates. 110 Cong. Rec. 13650-13652 (1964). Rather, the Tower Amendment was intended to "preclude the harassment of businessmen, companies, or unions by more than one Federal agency." 110 Cong. Rec. at 13650. The Amendment stated:

Exclusive Remedy

Sec. 717. Beginning on the effective date of Section 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrument in the executive branch of the Government or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title.

Id. Thus, the amendment had nothing to do with privately-filed court suits: It was directed only at preventing simultaneous investigations by "EEOC and the vari-

ous departments "charged with enforcing the provisions of the President's Equal Employment Commission's rules for Federal contractors." *Id.*

2. The 1972 Hruska Amendment

In the 1972 Title VII debates, the Senate rejected an amendment proposed by Senator Hruska to the effect that a charge filed under Title VII "shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency or labor organization." Debates on Hruska Amendment to Title VII of the Civil Rights Act of 1964, reprinted in *Legislative History of the Equal Employment Act of 1972*, 1282 (1972). At several points, § 1981 was mentioned as an alternative avenue of relief that was not to be eliminated. *Id.* at 1402, 1403 (citing *Jones v. A. Mayer*). Also the House Report cited to two cases which had applied § 1981 to private employment discrimination. See *Sanders v. Dubbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970); and *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971).

But the debates on this point were fairly perfunctory, and—except for the differences in statutes of limitations (118 Cong. Rec. 3961-62 (1972))—did not delve into the divergent paths taken by these two statutes, nor into the problems which this divergence could cause. Moreover, the brief reference to the decided cases mentioned above failed to point out that the federal courts had immediately recognized the potential problems that Congress had created and then overlooked.

D. Early Lower Court Decisions Recognized The Fundamental Problems Caused By The Coexistence Of § 1981 and Title VII

Around the time that Congress amended Title VII in 1972 and expanded EEOC's investigatory and enforcement authority, a number of lower courts found that § 1981 could be used as a parallel means to pursue em-

ployment discrimination.⁹ Unlike Congress, however, these courts immediately were bothered by the inconsistencies in the statutes and tried to find a way to accommodate the two in order to preserve Title VII's purposes of voluntary compliance and conciliation.

Thus, several circuits held that "while Title VII can impose no absolute procedural prerequisites on section 1981 litigation, allowing premature diversion of employment discrimination claims into court, would weaken Title VII conciliation efforts." *Developments in the Law—Section 1981*, 15 Harv. C.R.-C.L.L. Rev. 29, 240-241 (1980).¹⁰

The most thoughtful discussion was found in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 486-88 (7th Cir. 1970), cert. denied sub nom. *International Harvester Co. v. Waters*, 400 U.S. 911 (1970). Although recognizing that Congress had allowed Title VII charging parties to by-pass the EEOC and go directly to court under Title VII, the *Waters* decision also stated that:

Despite these indications we are convinced that had Congress been aware of the existence of a cause of action under section 1981, the absolute right to sue

⁹ A number of these cases were cited in *Jackson v. Railway Express*, 421 U.S. at 460-61 n.6. See *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1971), cert. denied, 409 U.S. 962 (1972); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied 405 U.S. 916 (1972); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), cert. denied sub nom. *International Harvester Co. v. Waters*, 400 U.S. 911 (1970); *Bundy v. Bristol-Meyers, Inc.*, 439 F.2d 621 (8th Cir. 1972); *Macklin v. Specter Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

¹⁰ See also, *Exhaustion of Remedies under Title VII (Equal Employment Opportunity) of Civil Rights Act of 1964* (42 USC § 2000e, et seq.) as Prerequisite to Maintenance of Action Under 42 USC § 1981 for Employment Discrimination, 23 ALR Fed 690, 903-914.

under that section would have been modified. Throughout the legislative history of Title VII, Congress expressed strong preference for resolution of disputes by conciliation rather than court action. Conciliation was favored for many reasons. By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. *The need for voluntary compliance was stressed since more coercive remedies were likely to inflame respondents and encourage them to employ subtle forms of discrimination.*

427 F.2d at 486-87 (emphasis added).

Because Congress placed such strong emphasis on conciliation, the *Waters* decision concluded: "we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good cause." *Id.* Thus, the court held that "an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies." *Id.*

The other courts of appeals did not go so far as to require the § 1981 plaintiff to prove that he had a reasonable excuse for not exhausting Title VII remedies. However, in order to encourage the use of EEOC conciliation facilities, they either ordered or suggested that the district courts stay the proceedings in the § 1981 suit until conciliation procedures under Title VII were carried out.¹¹ Some of the district courts discussed the

¹¹ See *Young v. International Telephone & Telegraph Co.*, 438 F.2d at 764; *Caldwell v. The National Brewing Company*, 443 F.2d at 1046; *Sanders v. Dobbs House, Inc.*, 431 F.2d at 1101; *Macklin v. Specter Freight Systems, Inc.*, 478 F.2d at 797. See also *Johnson v. Goodpastor Tire & Rubber Co.*, 491 F.2d at 1379 (Back pay under § 1981 cannot begin prior to the effective date of Title VII).

problem in harsher terms, recognizing that to entertain claims simultaneously under Title VII and § 1981 "would make Title VII . . . a redundancy and in large part an absurdity." *Smith v. North American Rockwell—Tulsa Div.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970), quoted on this point in *Taylor v. Safeway Stores, Inc.*, 333 F. Supp. 83, 87 (D. Colo. 1971).¹²

E. This Court's Decisions Construing Other Reconstruction-Era Civil Rights Statutes Further Recognized That Court-Oriented Private Lawsuits Imperil The Purposes Of Title VII

As noted above, this Court's decision in *Johnson v. Railway Express* pointed out the negative impact that § 1981 employment discrimination litigation would have on the proper enforcement of Title VII. But the Court concluded that because Congress had made the choice to permit two avenues of relief, the Court was "dissatisfied. . . to infer any positive preference for one over the other. . . ." 421 U.S. at 461. But when construing other Reconstruction-Era statutes, the Court has been quite inclined to preserve the Title VII administrative enforcement system to the exclusion of private litigation.

1. Brown v. GSA

Thus, in *Brown v. General Services Administration*, 425 U.S. 820 (1976), the Court held that Title VII is the exclusive remedy for claims of employment discrimination in federal employment and that the plaintiff could not also sue under § 1981. The Court concluded that the administrative and judicial remedies of Title VII were intended to provide exclusive relief and rejected assertions that this system could coexist with other judicial action. The Court stated:

¹² The court of appeals subsequently remanded *Taylor* on this point, 524 F.2d 525, 274-75 (10th Cir. 1975), following the issuance of this Court's decision in *Johnson*, but did not provide any further analysis of or solutions to the practical problems discussed in the district court's opinion.

Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717 (of Title VII), with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.

425 U.S. at 833.¹² The *Brown* decision also expressed concern that the administrative role that Congress gave the enforcement agencies "would be eliminated 'by the simple expedient of putting a different label on [the] pleadings.'" *Id.*, at 833. The Court in *Brown* concluded that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.*

Johnson v. Railway Express was distinguished in *Brown*—not on policy grounds—but on the fact that the legislative history of Title VII had recognized the existence of the right of private sector employees to sue under § 1981 but had seen no corresponding pre-existing right for federal employees. *Id.*, at 83. But this distinction in

¹² Courts construing the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq., also have recognized that permitting claims for compensatory and punitive damages would interfere with statutorily-mandated conciliation. See e.g., *Reps v. Egan Research & Engineering Co.*, 550 F.2d 834, 840-41 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978). The court noted that introducing the "vague and amorphous concept" of pain and suffering damages into the administrative setting "might strengthen the claimant's bargaining position" but it also would "introduce an element of uncertainty which would impair the conciliation process." 550 F.2d at 841. The court also noted that "[t]he possibility of recovering a large verdict for pain and suffering will make a claimant less than enthusiastic about accepting a settlement for only out-of-pocket loss in the administrative phase of the case." *Id.*

Accord, *Shalin v. Stanford Research Institute*, 580 F.2d 1292, 1296 (9th Cir. 1978); *Nelson v. Bank of California*, 649 F.2d 681, 689 (9th Cir. 1981); *Dunn v. American Security Insurance Company*, 550 F.2d 1036, 1038 (3d Cir. 1977), cert. denied, 434 U.S. 1066 (1978); and *Sant v. Mack Trucks, Inc.*, 624 F. Supp. 621, 622 (N.D. Calif. 1976).

no way solves the problems created by private sector § 1981 suits. It would be naive, at best, to think that § 1981 plaintiffs and their attorneys will be more likely to allow their claims to be pursued under Title VII's requirements merely because the employer operates in the private sector.

2. The Novotny Decision

The Court was bothered by identical concerns when it held that 42 U.S.C. § 1983(3) does not allow a private federal suit for an alleged conspiracy to deprive an individual of his Title VII rights. See *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 372-78 (1979). There, the Court noted that if a private suit were permitted alongside Title VII, "[t]he short and precise time limitations of Title VII would be grossly altered." 442 U.S. at 376. And "[p]erhaps most importantly, the complaint could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." *Id.*

What this discussion shows, therefore, is that after years of consideration of the national problem of employment discrimination, Congress enacted Title VII as the primary means of enforcement. It also established a system of administrative requirements that was intended to avoid litigation where possible and to encourage the parties and the EEOC to resolve disputes through conciliation and voluntary compliance. Yet the current state of the decisional law is that, because Congress allowed § 1981 to be used against employment discrimination, the plaintiff need only file a § 1981 pleading in federal court to frustrate the entire Title VII scheme.

¹³ See also, Shapiro, *Section 1981: Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 Am. U.L.Rev. 93, 112 (1985).

F. Title VII Is Being Interpreted And Enforced In A Manner That Protects The Rights Of Charging Parties Consistent With Federal Antidiscrimination Policy

As this Court has recognized repeatedly, Title VII's legislative history demonstrates that its detailed administrative/judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. See, e.g., *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. at 355, 359, 372-73. Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employees that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation rather than formal judicial proceedings. See Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L.Rev. 1100, 1200, 1270 (1971).

Ultimate resort to the federal courts also delegates the task of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L.Rev. 824, 881 (1972).

In addition, potential substantive conflicts between Title VII and § 1981 have been resolved in favor of those standards adopted by Congress in Title VII—even when specific exempting language of Title VII has not been found in § 1981.¹⁵ Thus, there can be no argument that

¹⁵ See e.g., *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316, 1320 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976) (seniority system that is valid under Title VII cannot be attacked under § 1981); *United States v. Trucking Management, Inc.*, 602 F.2d 36 (D.C. Cir. 1981); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), mod. on other

§ 1981 provides more protection than Title VII in defining what discriminatory conduct is prohibited under federal law. Indeed, it is Title VII that provides more protections, because, unlike § 1981, the EEOC and Title VII plaintiffs may proceed under the adverse impact theory and are not limited to the disparate treatment model. *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Washington v. Davis*, 426 U.S. 229 (1976).

Charging parties, moreover, have little cause to complain about the way in which Title VII's procedural requirements have been interpreted since the Act was amended in 1972 and the EEOC's authority was expanded. Indeed, many of the concerns that Title VII's technical requirements would adversely affect individual rights have proven to be unfounded. For example, Title VII's charge-filing requirement is not a jurisdictional prerequisite and, like § 1981's period, is subject to waiver, estoppel and equitable tolling.¹⁶ Also, the limitations period gap between the two statutes has been narrowed substantially.¹⁷ Moreover, charging parties may receive an award of attorney's fees under Title VII for work done in connection with administrative proceedings following reference to a state agency.¹⁸

grounds, 534 F.2d 1007 (2d Cir. 1976), cert. denied, 431 U.S. 365 (1977); and *United States v. East Texas Motor Freight System*, 564 F.2d 179, 185 (5th Cir. 1977) (same re Executive Order 11246).

¹⁶ *Zipes v. Trans World Airlines, Inc.*, 435 U.S. 385 (1982).

¹⁷ *EEOC v. Commercial Office Products Company*, 56 L.W. 4424 (U.S. May 17, 1988), virtually eliminated the 180-day filing period for Title VII. The Court held that the extended 300-day period applies in a deferral state even though an individual has not filed a timely 180-day charge with the state agency as required under state law. By contrast, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, requires that § 1981 suits are governed by the state personal injury statute of limitations period, which typically is much shorter than the contract suit limitations period sought by § 1981 plaintiffs.

¹⁸ *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

EEOC investigations, of course, can be an extremely effective enforcement method. To illustrate, the EEOC's investigatory and subpoena enforcement authority has been applied much more broadly than would be available to the individual § 1981 plaintiff.¹⁰ And should the EEOC decide not to sue, for whatever reason, the information developed in its investigation is available to the charging party and his attorneys once a private Title VII court suit is filed. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). See also, the discussion above at pp. 12-13.

The Court also should be aware of several relatively recent initiatives adopted by the EEOC to increase substantially the advantages to charging parties of proceeding under Title VII. First, effective August 1, 1987, the EEOC implemented a final rule permitting charging parties to appeal "no-cause" determinations issued by the agency's district directors. See 29 C.F.R. Part 1601.19. This procedure was adopted to assure that agency investigations were impartial, thorough, legally sound, professional, and conducted in a manner that would minimize the need for charging parties to sue without EEOC assistance.

Also, on February 5, 1985, the EEOC adopted a *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*, 8 Fair Empl. Prac. (BNA), 401:2615-401:2618. This policy was adopted in response to concerns that cases may be settled with less than full relief for discrimination victims. The policy provides for: full (not partial) back pay; enhanced reinstatement or placement rights; new notice posting requirements to inform other employees of discrimination problems; and potential direct disciplinary action against offending supervisory personnel.

In conjunction with its enhanced remedial policy, the EEOC also has adopted tougher policies and procedures for dealing with recalcitrant employers and in seeking sub-

¹⁰ *EEOC v. Shell Oil Company*, 466 U.S. 54 (1984).

poenas.¹¹ Under these policies, when an employer fails to comply with requests for information in a timely or complete manner, EEOC district directors are directed to take one or more actions. These include: immediate issuance of a subpoena; proceeding more directly to litigation; and drawing an adverse inference against a respondent as to the evidence sought when records are destroyed or not maintained.

Moreover, when the EEOC decides to sue an employer, it may do so unencumbered by the class action limitations of Rule 23 of the Federal Rules of Civil Procedure.¹² As this Court noted, by expanding the EEOC's enforcement powers in 1972, "Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. . . . The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 [of Title VII] was not superseded." 446 U.S. at 325-36.

Further, "EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." 446 U.S. at 331. EEOC also may proceed unencumbered by Rule 23's requirement that an individual's claim be typical of other class members.¹³ *Id.* And when the district court finds that discrimination has occurred, it "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like

¹¹ See 29 C.F.R. 1601.16(b)(1) and (2) [subpoenas]; and EEOC: Investigative Compliance Policy, 8 Fair Empl. Prac. (BNA) 401:2625-40:2626.

¹² *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980).

¹³ Compare, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (applicant cannot be class representative for incumbent employees).

discrimination in the future." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added).

Accordingly, EEOC-brought Title VII actions benefit the public interest, rather than purely private concerns, in many ways that § 1981 suits do not. Individual plaintiffs, quite frankly, often are motivated primarily by an attempt to extract the maximum possible monetary award or settlement, unencumbered by administrative requirements intended to eliminate discrimination on a broader scale by the involvement of an expert agency designed to give assistance to all victims of discrimination.

CONCLUSION

As the discussion above indicates, the emphasis in § 1981 on maximum individual relief encourages plaintiffs to by-pass Title VII, thereby negating the ability of the EEOC to seek relief for all victims through its enhanced ability to investigate beyond an individual problem and then to conciliate charges of discrimination. EEAC urges the Court to use this case as a vehicle to explicate these practical considerations and to emphasize that the dichotomy between these coexisting remedial schemes often impedes in the proper functioning of the nation's civil rights laws.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1987

—●—
BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

—●—
**On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

—●—
**BRIEF OF THE CENTER FOR CIVIL RIGHTS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

—●—
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No. 87-107

In The

Supreme Court of the United States

October Term, 1987

BRENDA PATTERSON,

Petitioner,

vs.

MCLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF OF THE CENTER FOR CIVIL RIGHTS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and fundamental individual rights.

A vital aspect of this mission is defending the integrity of the civil rights laws. That requires challenging precedents in which the aims of civil rights laws have been frustrated, *see, e.g., Slaughter-House Cases*, 83 U.S. 36 (1873) (holding economic liberty not within the privileges

or immunities clause of the 14th Amendment), as well as precedents, as here, that far exceed the laws' objectives. Fidelity to our nation's commonly shared principles as expressed in the civil rights laws is crucial to the ultimate sanctity of civil rights.

SUMMARY OF ARGUMENT

The integrity of our civil rights laws depends upon judicial construction faithful to the intent of the laws. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court erroneously found in 42 U.S.C. § 1981 an intent to compel private individuals to enter into contracts against their will. This interpretation is inconsistent with the statute's plain language, with its legislative history, and with roughly contemporaneous judicial interpretations and subsequent actions by Congress. Viewed in its historical context, the law was plainly designed to eradicate state action that deprived blacks of contractual liberty and to invest in blacks the legal capacity to make and enforce contracts, not to reach purely private actions such as refusals to enter into contracts.

This was the understanding of this Court for nearly a century until *Runyon*. In *Runyon*, the Court embarked upon a course of activism that has forced it to decide issues that were never contemplated by the law's framers. The Court may extricate itself from this extra-judicial quagmire only by overruling *Runyon*. Rather than relying on Congress to take such action, the Court should correct its own error.

ARGUMENT

I. CONGRESS NEVER INTENDED § 1981 TO REACH PRIVATE CONDUCT, PARTICULARLY REFUSALS TO ENTER INTO CONTRACTS

Justice White was correct in his dissent in *Runyon v. McCrary*, 427 U.S. at 195 (White, J., dissenting), that the plain language of 42 U.S.C. § 1981 does not extend to private conduct, and also that the statute in its present form is based on the authority of the 14th Amendment, which controls only state action. *Id.* at 201-202. Either fact should have ended this Court's inquiry in *Runyon*, and would justify corrective action here in overruling *Runyon*.

Moreover, an examination of the circumstances surrounding the adoption of the Civil Rights Act of 1866, to which not only the operative language of §§ 1981 and 1982 but also the joint resolution that was later adopted as the 14th Amendment trace their origins, see *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982), only reinforces this view. This legislative history leaves "no doubt" that the construction of § 1981 in *Runyon* "would have amazed the legislators who voted for it." *Runyon*, 427 U.S. at 189 (Stevens, J., concurring).

"[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947). The circumstance motivating the enactment of the 1866 Act was the widespread adoption of state legislation that effectuated private efforts to perpetuate the subordinate status of blacks. The 1866 act's aim was to eradicate such legislation, and in

the specific context of contracts, to invest blacks with the capacity to enforce their right to contract. Congress never intended to compel individuals to enter into contracts against their will. Given the substantial impact on individual liberty that such a compulsion to contract entails, this Court should not lightly infer an intent by Congress to do so.

1. A. The post-Civil War South experienced tremendous economic dislocation. Though southern leaders applied peer pressure and other tactics to encourage their fellow landowners to voluntarily limit employment opportunities and restrict wages, "white employers vigorously competed with one another for black labor." Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161, 1161 (1984); see also R. Higgs, *Competition and Coercion* 37-61 (1977). Pro-slavery philosopher George Fitzhugh warned his fellow southerners, "We must have a black code"; not to restore "slavery such as that which has been recently abolished," but to implement "some sort of subordination of the inferior race that will compel them to labor." J. McPherson, *The Struggle for Equality* 302 (1964). The black codes thus represented "attempts to enforce a labor-market cartel among white employers that could not be enforced in any other way." Roback at 1162.

This process of effectuating private discrimination through the coercive apparatus of the state was chronicled by Maj. Gen. Carl Schurz in his Report on the Condition of the South, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1866). Schurz observed that in the economically ravaged South of 1865, "free negro labor being the only thing in immediate prospect, many ingenious heads set

about to solve the problem, how to make free labor compulsory by permanent regulations." *Id.* at 22. Schurz reported a number of local laws designed to keep blacks subservient, *id.* at 23-24, and he warned that "although the freeman is no longer considered the property of the individual master, he is considered the slave of society, and all independent state legislation will share the tendency to make him such." *Id.* at 45.

As Schurz predicted, several southern states passed laws restricting the competitive labor market prior to the 1866 Civil Rights Act. A number of states in 1865 and early 1866 passed "enticement" laws, making it a crime for one employer to try to hire a laborer away from another. Roback at 1166. Six states also passed vagrancy statutes prior to the 1868 Act, making it unlawful to be unemployed. 6 C. Fairman, *The History of the Supreme Court of the United States* 1185 n.191 (1971). An 1865 Mississippi law, for instance, provided that any black laborer who quit during his contract term would forfeit a year's wages and could be arrested and returned to the employer at the laborer's expense. G. Stephenson, *Race Distinctions in American Law* 47 (1910). Other laws, such as oppressive licensing regulations, prevented freemen from applying in their own behalf the skills they had learned as slaves. C. Bolick, *Changing Course: Civil Rights at the Crossroads* 25 (1988). In sum, the black codes comprised an interwoven tapestry that restored as closely as practicable the feudal society that existed in the pre-Civil War South, and "were intended to accomplish what race prejudice could not do by itself." Roback at 1162.

Though the black codes were of recent vintage, the members of the 39th Congress were keenly aware of legal

restrictions on black economic opportunities, not only through reports from the South,¹ but also in light of the fact that the black codes were modelled after laws in northern states governing free blacks that were passed in the 1840s and '50s. G. Stephenson at 36-38. Given that the black codes were what made private discriminations effective, it is well understandable that "the principal object of the legislation was to eradicate the Black Codes." *General Building Contractors*, 458 U.S. at 386.

Indeed, Rep. Samuel Shellabarger stressed that the "bill does not reach mere private wrongs, but only those done under color of State authority. . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act." Cong. Globe, 39th Cong., 1st Sess. 1293-1294. Rep. Burton Cook explained more fully the objective of the bill. He asked, "What is the situation of affairs for which we are called to legislate for four million human beings who have been set free from chattel slavery?" *Id.* at 1123-1124. In six southern legislatures, he observed, laws had been passed that were "so malignant" and "subversive of their liberties" that military commanders issued orders forbidding their enforcement. *Id.* at 1124. Cook continued,

¹ The Schurz report was before Congress while it was considering the 1866 Act, but the hearings of the Joint Committee on Reconstruction, upon which petitioner relies heavily, see Brief for Petitioner on Reargument at 27-40, were not completed until after the bill became law, and the committee's report was not prepared until even later. 6 C. Fairman at 1184.

The time when these men can be protected by the military power will cease. . . . Suppose . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. . . . [T]hose states have already passed laws which would virtually reenslave them. . . . I know of no way by which these men can be protected except it be by the action of Congress, either by passing this bill or by passing a constitutional amendment.

Id. at 1124. Likewise, Sen. James F. Wilson, noting that Gen. Grant had issued orders setting aside black codes, explained that "[t]his measure is called for because these reconstructed Legislatures, in defiance of the rights of the freedmen and the will of the nation . . . , have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days." *Id.* at 603. This legislative history demonstrates that Congress recognized that private discrimination was being effectuated through state action, hence requiring federal legislation aimed at removing this coercive tool from the hands of the oppressors. See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 450-472 (1968) (Harlan, J., dissenting).

B. If § 1981 is derived from the 1866 Act and thus enforces the 13th Amendment, as Petitioner contends, it must be addressed to removing a condition of the slavery that the amendment abolished. In the context of contract rights, the condition of slavery that § 1981 cures is the slaves' lack of legal capacity to contract -- a disability (like the others cured by § 1981) that is visited upon individuals by state action, not by private action.

As Justice White observes in his *Ranney* dissent, "Congress' purpose . . . was solely to grant all persons

equal capacity to contract." *Ryan*, 427 U.S. at 205 (White, J., dissenting). The "inflexible rule of the law of African slavery" was that "the slave was incapable of entering into any contract." *Hall v. United States*, 92 U.S. 27, 30 (1875). After the Civil War the right to contract was deemed a fundamental civil right, yet was being frustrated by the refusals of southern governments to enforce blacks' contractual rights and by state laws that interfered with freedom of contract.

Rep. Martin Thayer, for instance, denounced the "tyranny of laws" by which a man "may be deprived of the ability to make a contract" - "laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedman and render the constitutional amendment of no force or effect whatever." Cong. Globe, 39th Cong., 1st Sess. 1152-53. The bill, he explained,

after extending these fundamental immunities of citizenship to all classes of people in the United States, simply provides means for the enforcement of these rights. . . . How? . . . It imposes duties upon the judicial tribunals of the country which require the enforcement of these rights. It provides for the administration of laws to protect these rights. It provides for the execution of laws to enforce them.

Id. at 1153. The 1866 Act, then, was intended to cure a defect of state law and administration of justice. As Rep. Shellabarger confirmed, "its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former conditions in slavery." *Id.* at 1293. Since the condition of slavery at issue here - lack of legal capacity to make and enforce contracts - is a function of state law and not private action,

the 1866 Civil Rights Act is plainly limited to curing impediments and discriminations created by state action.

2. Even if § 1981 was intended to reach private acts against blacks,² such as physical interference with the rights protected by the laws, it is quite another matter to apply the law to that species of private conduct at issue in *Ryan*, 427 U.S. at 170-171 - a private individual's refusal to contract.

In construing the language of § 1981 that gives all citizens "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" (emphasis added), Justice White notes that "[w]hites had at the time . . . no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract." *Id.* at 194 (White, J., dissenting). Indeed, the jurisprudence of the period held that the "very essence" of a contract is "[m]utual assent to its terms." *State of Louisiana v. Mayor and Administrator of City of New Orleans*, 109 U.S. 283, 288 (1883). The legislative history makes clear that Congress did not intend to supplant this vital aspect of contractual freedom. Rep. Cook, for instance, declared that "[w]e are not pointed to one single right now possessed of a single white man in this Government touched or impaired by the provisions of this bill." Cong. Globe, 39th Cong., 1st Sess. 1184.

² Many of the acts recounted in petitioner's brief that are described as private, such as violence, extortion, and failure to comply with contractual terms, can only be effectuated through a race-conscious administration of justice, which is a form of state action.

This very distinction between capacity to enter into and enforce contracts, which Congress intended to extend to all persons, and the right to refuse to enter into contracts, which Congress did not intend to disturb, formed the basis for this Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), striking down provisions of the Civil Rights Acts of 1875.³ The Court observed that lack of capacity to enter into contracts was a badge of slavery redressable by congressional action pursuant to the 13th Amendment, but that the "denial to any person" of public accommodations could not be redressed under the amendment. *Id.* at 21. As Justice Bradley explained, civil rights "cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings." *Id.* at 17. Interferences with the right to contract or hold property, the Court declared, are "simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the State, . . . his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." *Id.* at 17.

Failure of states to afford such vindication of rights was, as earlier noted, precisely the evil to be corrected by

³ The argument of amici *Foner, et al.*, that the state/private action distinction was not recognized in late 19th century jurisprudence, see Brief of *Foner, et al.*, at 11-13, is puzzling in light of the reliance on this distinction by the Court in this 1883 decision. If Congress or the Court did not make more of this distinction, it is only because at that time "[i]t would have been a striking novelty in American jurisprudence . . . to require a person to make a contract with someone he chooses not to contract with." *Acton, The Civil Rights Act 1866, The Civil Rights Bill of 1866, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274, 306 (1967).

§ 1981. Petitioner presents no evidence whatsoever that Congress intended to compel individuals to enter into contracts against their will.

3. This interpretation is consistent not only with the statute's plain language, legislative history, and early interpretations by this Court, see e.g., *Civil Rights Cases*, *supra*, but also with subsequent congressional action. The 14th Amendment, limited to state action, was ratified in 1868; and Congress enacted § 1981 in its present form in 1870 pursuant to that amendment. As this Court noted in *General Building Contractors*, 458 U.S. at 389-90, "In light of the close connection between [the 1870 Act] and the Amendment, it would be incongruous to construe the principal object of . . . § 1981, in a manner markedly different from that of the Amendment itself."

Moreover, Congress subsequently passed the Civil Rights Act of 1875 (18 Stat. 335) guaranteeing equal access to public accommodations. If Congress had intended earlier legislation to cover such instances, as Petitioner would have it, why would it soon thereafter pass new legislation covering the same subject?⁴

Finally, Congress passed sweeping civil rights legislation in the 1960s. In particular, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was "design[ed] as a comprehensive solution for the problem of invidious discrimination in employment." *Johnson v.*

⁴ In *Rapson*, 427 U.S. at 189 (Powell, J., concurring), Justice Powell suggests that § 1981 extends only to private "commercial relationship[s] offered generally or widely," but that is exactly what the subsequent Civil Rights Act of 1875 was designed to reach.

Railway Express Agency, 421 U.S. 434, 439 (1975). Petitioner suggests § 1981 "fill[s] in gaps in the coverage of federal anti-discrimination statutes" and provides "supplemental procedures and remedies," see Brief for Petitioner on Reargument at 113, but it would have required amazing prescience for Congress in the 19th century to supplement and fill in the gaps of laws that would be passed nearly a century later. In reality, of course, exactly the converse was true: Congress in each instance was acting to supplement and fill in the gaps it perceived were left open by the legislation passed in 1866 and 1870. If additional coverage is necessary and desirable, that is a "task appropriate for the Legislature, not for the Judiciary." *Runyon*, 427 U.S. at 212 (White, J., dissenting).

4. When litigants ask this Court to apply a general statute in a way that would limit individual liberty, especially a right that is explicitly protected by the Constitution such as freedom of contract, see U.S. Const. art. I, § 10, this Court should exercise special caution and restraint. This is true even where the underlying private conduct may be repugnant. Cf. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds"); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (private racial preferences).

The tension inherent in petitioner's argument is that this Court should apply a law that was intended to expand contractual liberty to all Americans in a way that would limit such liberty for everyone. That such liberty is sometimes exercised in ways that society finds offensive does not give this Court license to expand a statute

beyond its intent. To do so requires this Court to substitute its values for the values of society generally, as expressed in the nation's Constitution and statutes. Here no need exists for this Court to so apply § 1981, since Congress has drawn in Title VII a balance between such individual liberty interests as freedom of contract, freedom of association, and free exercise of religion on one hand, and the government's interest in eradicating employment discrimination on the other. See, e.g., Title VII, § 701(b) (exempting Indian tribes from coverage); §§ 702 and 703(e)(2) (religious exemptions); § 701(b)(2) (exemption for bona fide membership clubs). This Court should refrain from applying a generally worded statute in a way that might disrupt this delicate accommodation of competing interests and that would further restrict individual liberty without a clear mandate from Congress to do so.

II. STARE DECISIS SHOULD NOT BAR THIS COURT'S REEXAMINATION OF RUNYON UNDER THE UNUSUAL CIRCUMSTANCES OF THAT DECISION

This Court has reexamined its prior statutory interpretations in a variety of contexts applicable to the present situation. Statutory interpretations were overruled, for instance, where, as here, the decision departed from prior precedent⁵ and misapprehended legislative history.

⁵ *Runyon* itself was a significant departure from *stare decisis*, overruling a long line of cases in which the Court indicated § 1981 applied only to private action. See e.g., *Hurd v. Hodge*, 334 U.S. 24 (1948); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Civil Rights Cases*, *supra*; *Neal v. Delaware*, 103 U.S. 370 (1880); *Virginia v. Rives*, 100 U.S. 313 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

Monnell v. Dep't. of Social Services of the City of New York, 436 U.S. 658, 695-701 (1978), see also *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 72 (1938); and where the interpretation has proven "unworkable." See, e.g., *Garcia v. San Antonio*, 469 U.S. 528, 537 (1985). The Court has reversed its prior errors even after affirming them, see, e.g., *Monnell*, 436 U.S. at 696 (earlier decision affirmed three times); *Helvering v. Hallock*, 309 U.S. 108, 123 (Roberts, J., dissenting) (1946) (earlier decision followed at least 50 times); and even where Congress has re-enacted the statute at issue without altering the Court's interpretation. *Id.* Although properly declining to "lightly overrule recent precedent," *Garcia*, 469 U.S. at 557, this Court has declared that "we cannot evade our own responsibility for reconsidering in the light of further experience, the validity of distinctions which this Court has itself created." *Helvering*, 309 U.S. at 122.

Runyon is such a substantial departure from prior precedent and legislative history - a departure that requires the Court to engage in further activism as each successive issue never contemplated by the law's sponsors arises - that this Court "should not continue to confound confusion." *Jones v. United States*, 366 U.S. 213, 221 (1960), but should correct its error.⁶

⁶ Since § 1981 "reach[es] relatively few situations not also covered by Title VII," B. Schlei and P. Grossman, *Employment Discrimination Law* 668 (2d ed. 1983), the only persons who might rely on *Runyon* to their detriment in the employment context would be those who seek to evade the procedural or remedial limitations carefully framed by Congress in Title VII.

1. When this Court decided in *Runyon* that § 1981 applies to private refusals to contract, it "amounted to the equivalent of new legislation enacting a broad, general purpose statute prohibiting discrimination against blacks." Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 Yale L. J. 1441, 1476 (1975). As Justice White warned, once § 1981 was loosed from its statutory moorings, the Court would "be called upon to balance sensitive policy considerations - which have never been addressed by any Congress - all under the guise of 'construing' a statute." *Runyon*, 427 U.S. at 212 (White, J., dissenting).

Justice White's warning has proved prophetic. Whenever a court departs from a statutory mandate, in essence creating a new statute, it forces the Court to confront issues with no certain guideposts; and the further it strays from legislative intent, the more it becomes a law maker rather than a law interpreter. That is the unfortunate and improper role the Court assumed when it decided *Runyon*.

In the intervening years, this Court and other courts have been repeatedly called upon to decide how far § 1981 regulates private conduct and how it interrelates with Title VII. For instance, does it supplant Title VII's private club exemption? See *Runyon*, 427 U.S. at 172 n.10. Does it extend to "personal contractual relationship[s]"? See *id.* at 188 (Powell, J., concurring). Does § 1981 provide a cause of action to federal employees? See *Brown v. General Service Administration*, 425 U.S. 820 (1976). Does it cover all aspects of the employment relationship, such as harassment by the employer, as petitioner asks this Court to hold? This confusion is exacerbated by decisions that appear to contradict one another. Compare, e.g., *Runyon*

(holding that § 1981 applies to private action) with *General Building Contractors, supra* (holding that § 1981 requires a showing of intent since it enforces the 14th Amendment).

In *Runyon*, 427 U.S. at 188 (Powell, J., concurring), Justice Powell noted that no "bright line" can be drawn that easily separates the types of contract offer within the reach of § 1981 from the type without. The source of the blurred lines is *Runyon* itself. In reality, Congress did supply a "bright line": it intended § 1981 to apply to state action only. Moreover, Congress subsequently enacted broad remedial legislation to deal specifically with private discrimination in a wide variety of contexts. The many lines drawn by Congress in that legislation - procedural, substantive, remedial - resulted from extensive and careful deliberation that is entrusted by our Constitution to the legislative branch. This Court can remove itself from the self-perpetuating abyss of judicial lawmaking only if it overrules *Runyon*.

2. Petitioner contends that the failure of Congress to enact legislation reversing *Runyon* amounts to congressional adoption of the decision. Brief for Petitioner on Reargument at 98-97. This Court, however, has repeatedly hesitated to "place on the shoulders of Congress the burden of the Court's own error." *Girouard v. United States*, 328 U.S. 61, 70 (1946). Rather, the Court has advised "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." *Helvering*, 309 U.S. at 119. Thus, as Justice Brennan declared in *Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235, 242 (1970), "the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision." Indeed, the Court is free to correct its error even if "[m]any

efforts" were made unsuccessfully in Congress to change the decision. *Girouard*, 328 U.S. at 69.

The notion that Congress may conceivably cure a judicial misinterpretation certainly does not give the Court *carte blanche* authority to override the purpose of a statute or use it to "fill in the gaps" of remedial coverage. Given the dynamics of the political process and the presence of special interest groups that can effectively block much legislation, the Court is in the best position to police its own excesses.

This self-policing function is especially appropriate in civil rights cases. Our nation's two century-old quest to make good on its promise of civil rights rests on an often fragile popular consensus grounded in certain core ideals. The civil rights laws generally reflect the outermost limits of that consensus. America's commitment to civil rights depends in large measure on the judiciary's fidelity to those laws. See C. Bolick at 53-75. In *Runyon*, the Court departed in a major way from the intent of one such law. It should confess error and return to Congress its vital role as maker of the laws.

CONCLUSION

For the foregoing reasons, we urge this Court to reconsider and overrule *Ramsey*.

Respectfully submitted,

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